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IN THE SUPREME COURT OF THE UNITED STATES

October 1943 Term

No. 111

FRED PINE (the appellant below),

Petitioner,

vs.

UNITED STATES OF AMERICA (the appellee below),

Respondent.

Petition for Writ of Certiorari to United States Circuit Court of Appeals for Fifth Circuit and Supporting Brief

JAMES M. CARSON (Congress Building, Miami, Florida) and VINCENT C. GIBLIN (Ingraham Building, Miami, Florida), Counsel for Petitioner.

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To--THE HONORABLE HARLAN F. STONE, CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Fred Pine, respectfully prays that the Court issue a writ of certiorari, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding it to certify and to transmit to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals in that certain cause, numbered 10336, wherein Fred Pine (the petitioner here) was appellant and the United States of America (the respondent here) was appellee, so that the said cause may be reviewed and determined by this Court, as provided for by the governing statutes and rules, and so that the judgment of the said Circuit Court of Appeals in the said cause may be reversed by this Court.

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

The petitioner, Fred Pine (an attorney of the City of Miami, Florida), was charged in an indictment (r. 1-4) returned in the District Court of the United States for the Southern District of Florida with having conspired with others "to unlawfully, wilfully, knowingly and feloniously transport and cause to be transported and aid and assist in obtaining transportation for and transporting in interstate commerce from Chattanooga, Tennessee, Atlanta, Georgia, and divers other places to the grand jurors unknown, to Dade County, State of Florida, certain women and girls, to-wit, Mary Agnes

McCullar, Frances Pauline McCullar, Billie Johnson, Ann Bennett, Jessie Asher, Betty Martin Tinker and Frances Jobe, sometimes known as Frances Hollborn, and divers and sundry other women and girls whose **names** are to the grand jurors unknown, with the intent and for the purpose of enticing, inducing and compelling **said** women and girls to enter into a life or condition of debauchery, **that is to say,** for the purpose of employing them to work for the Palm Lake Development, Inc., a corporation owning and operating the La Paloma Club, amid such surroundings and under such conditions as **tended** to induce **the women and girls aforesaid** and other women and girls to the grand jurors unknown, to give themselves up to a condition, form and type of debauchery that **would naturally lead** them to a course of sexual immorality, in violation of the provisions of the Act of June 25, 1910 (Section 398, Title 18, U. S. C. A.)."

The indictment was based on the opinion and decision of this Court in the case of Louis Athanasaw and Mitchell Sampson v. United States, 227 U. S. 326, 57 L. ed. 528, 33 S. C. 285.

In a motion (r. 5-7) to quash and in a demurrer (r. 13-15) the petitioner attacked the indictment on the grounds (among others) that (a) it did not appear by or from the facts alleged that he was guilty of any violation of any statute or law of the United States; that (b) the indictment is duplicitous; and that (c) his prosecution under the indictment would be violative of his right, guaranteed to him by Article VI of the Amendments to the Constitution of the United States, "to be informed of the nature and cause of the accusation" against him, and would subject him to being twice put in jeopardy for

the same offense in violation of Article V of the Amendments to the Constitution of the United States.

The motion to quash was denied (r. 13-15) and the demurrer was overruled (r. 13-15).

The petitioner moved (r. 7-9) for the entry of an order requiring the Government to file a bill of particulars in and by which "the Government shall specify, with reasonable certainty and definiteness, the names of any women or girls, other than Mary Agnes McCullar, Frances Pauline McCullar, Billie Johnson, Ann Bennett, Jessie Asher, Betty Martin Tinker and Frances Jobe [the women or girls whose names were known to the grand jurors and whose names were set forth in the indictment], to effect the illegal transportation of whom the Government expects to prove the defendant conspired."

The motion was granted (r. 13-15) and the Government was required to specify (in a bill of particulars) "the name or names of any woman or women, girl or girls, other than Mary Agnes McCullar, Frances Pauline McCullar, Billie Johnson, Ann Bennett, Jessie Asher, Betty Martin Tinker and Frances Jobe, to effect the illegal transportation of whom the Government expects (at the trial) to prove the defendant conspired."

In its bill of particulars (r. 15-22) the Government specified the name of Rachel Louise Clark (an alleged co-conspirator and accomplice) as the name of the only woman or girl (other than the women or girls whose names were known to the grand jurors and whose names were set forth in the indictment) to effect the

illegal transportation of whom the Government expected to prove the defendant conspired.

The petitioner entered a plea of not guilty (r. 22) to the indictment; and a trial by jury (r. 22) ensued.

The petitioner entered into the trial to defend himself against the charge that he had conspired with others to effect the illegal transportation in interstate commerce of specific persons (the women and girls named in the indictment and in the bill of particulars).

The transcript of the evidence (r. 33-653) adduced at the trial is voluminous. There is no need, however, for an exhaustive review and analysis of the proofs. For the purposes of this petition a statement of some of the matters shown by such proofs and a brief summarization of all of the evidence will suffice.

The Government relied solely on circumstantial evidence. Despite the fact that Evelyn Clark Youst and Rachel Louise Clark (named in the indictment as two of the petitioner's co-conspirators and accomplices) testified as witnesses for the Government, there was no direct or positive testimony or proof that the petitioner had entered into any conspiracy to effect the transportation in interstate commerce of any women or girls.

Al Youst (named in the indictment as another of the petitioner's co-conspirators and accomplices), prior to the incorporation of Palm Lake Development, Inc. (the corporation named in the indictment), had owned and operated for several years the La Paloma Club, a night club near the City of Miami, Florida. Because of

the club's proximity to a school and because of his having been convicted of a felony, Youst had been unable to procure a license for the sale of liquor at the club. Several times he had been arrested and charged with having illegally sold liquor at the club. He decided, because of the legal impediments to his procurement of a liquor license, to change the location of the club and to obtain a license through the instrumentality of a corporation in which he should have no apparent stock interest. He purchased (at a cost approximating $5,000) a tract of land, the legal title to which was vested in his sister, Mrs. Hazel McNichols, for the purpose of concealing the true ownership of the property. He caused to be constructed on the land a club building and a number of cottages. The entire cost of construction (a sum in excess of $17,000) was paid by Youst. He employed the petitioner to render the necessary legal services incident to the procurement of a corporate charter and to the organization of the corporation. After the corporation was formed, seventeen of its twenty shares of capital stock were issued to Mrs. McNichols and her husband, James McNichols, in consideration of the transfer to the corporation of the title to the club property; two shares were issued to the petitioner; and the remaining share was issued to Bert Reeves, a carpenter who had supervised the construction of the buildings erected on the club property. All of the officers and directors of the corporation were "dummies." Initially Holmes Allen, an employee, was made president; Bert Reeves, the carpenter, was made vice-president; and the petitioner was made secretary and treasurer. Later, when Allen severed his connection with the club, Reeves was made president; and Frank Talley, the orchestra leader, was made vice-president. The corporation and its business and affairs

and its finances were dominated and controlled by Youst. No one, other than he, contributed any money or property to the corporation's capital or advanced to it any funds. In short, the corporation constituted a "front" behind which Youst operated and managed at a different location the same business which he had formerly operated and managed individually.

As secretary of the corporation, the petitioner's only function was to draft corporate minutes reflecting Youst's wishes. No formal stockholders' or directors' meetings were ever held. As treasurer of the corporation, the petitioner's only function was to sign corporate checks, which, however, were not valid or negotiable bank drafts unless and until they were countersigned by Youst, as "manager." The petitioner's custom was to sign (in his law office, at home or at the club) a large number of checks in blank for Youst's future use. The petitioner exercised no control over the corporate bank account and had no knowledge or information at any time as to its status.

The La Paloma Club was opened for operation at its new location on New Year's eve of 1938. A license for the sale of liquor at the club had been applied for and obtained by Allen individually. The license fee (of $1,500) was advanced by Youst. Later, after the corporation had been organized, an application was made to the county commissioners of Dade County for their approval of a transfer of the license from Allen to the corporation. The Government adduced testimony which concededly shows that the commissioners were induced to approve the transfer by the petitioner's deceptive representation that Youst had and was to have no connection with the

club. There is also in the record evidence that the pretense that Youst was not the owner of the club was continued after the transfer of the liquor license for the purpose of deceiving the law enforcement authorities and the public generally in order to prevent the revocation of the license.

It must be admitted that the atmosphere which prevailed at the club was extremely immoral. Female entertainers danced almost nude and engaged in dances and other activities which were lewd and sexually suggestive in the extreme. The two fundamental factors which contribute to the successful operation of most night clubs—liquor and sex—were not disguised in tinsel or glamor at the La Paloma Club. Its crude and bold appeal was to patrons who like their liquor and their sex "raw."

The floor show and the entertainment at the club were managed by Youst and Evelyn Clark (his mistress whom he later married). They employed and discharged the hostesses, the entertainers, the bartenders and all of the other employees of the club (r. 283). The petitioner was not even consulted as to the employment or the discharge of any of the employees (r. 283).

Shortly after the club resumed operation at the new location Evelyn Clark induced her younger sister, Rachel Louise Clark, who was living with their mother in Chattanooga, Tennessee, to come to Miami and to accept employment at the club. Her transportation expenses were paid out of the club's funds. The petitioner, however, was totally ignorant of any plan or purpose to effect her transportation and of her coming to Miami (r. 258). Not

knowing of any such plan or purpose he, of course, could not have been a party to it.

In March, 1939 Evelyn Clark was visiting her mother in Chattanooga. During the visit she met Betty Martin Tinker and induced her to come to Miami and to accept employment at the club. Her transportation expenses were paid out of the club's funds. But there was no evidence that the petitioner knew of the plan or purpose to effect the transportation of Betty Martin Tinker or of her coming to Miami (r. 276); and, therefore, could not have been a party to any such plan or purpose.

In June, 1939 Carroll King, named in the indictment as another of the petitioner's co-conspirators and accomplices, and Rachel Louise Clark left Miami in King's automobile and drove to Atlanta, Georgia. She proceeded alone to Chattanooga to visit her mother. Before they left Miami Youst instructed them to publish in Atlanta and Chattanooga newspapers advertisements designed to attract girls as prospective employees. There was no evidence, however, that the petitioner had any knowledge of the contemplated journey of Carroll King and Rachel Louise Clark, of their departure, of the instructions given them by Youst, or of their activities during their absence (r. 267-274). They procured five women or girls (Mary Agnes McCullar, Frances Pauline McCullar, Billie Johnson, Ann Bennett and Jessie Asher) and King transported them to Miami in his automobile and they accepted employment as hostesses and entertainers at the club. The expenses of their transportation were paid out of the club's funds. There was no evidence, however, that the petitioner knew of the plan or purpose to effect their transportation or of their coming to Miami (r. 264-274)

and, consequently, he was not a party to any such plan or purpose.

During another visit of Evelyn Clark to Chattanooga she endeavored to persuade Frances Jobe to accept employment at the club, but the latter evidenced no interest in such employment. The petitioner knew nothing of the conversation in Chattanooga between Evelyn Clark and Frances Jobe and was never told about it (r. 283). Later Frances Jobe came to Miami at her own expense. No one connected with the club knew of her coming (r. 282). On her arrival she went to the club and solicited and obtained employment.

The only other evidence as to any plan or purpose to induce women or girls to come from other states and to accept employment at the club was proof that Youst caused an advertisement to be published in the Billboard (a theatrical magazine); but there was no evidence that the defendant knew, before the introduction of such evidence at the trial, that Youst contemplated the publishing of the advertisement or that it was published.

The Government relied on a number of circumstances in its effort to prove the petitioner's guilt of the offense charged in the indictment. There is in the record evidence that he performed the legal services incident to the incorporation and organization of Palm Lake Development, Inc.; that he became a stockholder, director and officer of the corporation; that as treasurer of the corporation he signed its checks (in blank); that he deceived the county commissioners in the procurement of their approval of the transfer to the corporation of the liquor license; that he actively participated in the effort to con-

ceal from the law enforcement officers and the public the true ownership of the La Paloma Club; that in such effort he openly professed to be, and represented himself as, the owner or one of the owners of the club; that he frequented the club; that he witnessed the entertainment provided by the club; that he drank liquor at the club; that he engaged in obscene conversations at the club with the hostesses and entertainers; that on one occasion (incredible as the extremely prejudicial testimony is) he engaged, in the presence of three eye witnesses (all of whom were Government witnesses, but none of whom corroborated the fantastic story), in an illicit and perverted act of sexual intercourse with one of the entertainers; that on one occasion he expressed the desire and the intention to make Rachel Louise Clark his mistress (although there was no evidence that he ever attempted to effectuate such an intention); and that by his legal services and advice he enabled Youst to continue the operation of the club despite the efforts of local law enforcement officers to close it as a public nuisance. The petitioner's principal function in connection with the club was as attorney for Youst and the corporation. He represented Youst and his employees in no less than thirty criminal cases. He was counsel for the corporation in at least two civil suits (one of which was an injunction suit brought by the state attorney and the county solicitor in an effort to effect the closing of the club as a public nuisance).

The only financial benefit which the petitioner enjoyed as a result of the club's operation was the payment by Youst to him of fees (insignificant in amount) for his legal services. He received no salary and shared in no dividends or profits.

We assert flatly and emphatically that the record reveals no evidence, direct or circumstantial, that the petitioner entered into any plan or agreement to effect the transportation in interstate commerce of any woman or girl for the purpose of employing her to work for Palm Lake Development, Inc. We challenge counsel for the respondent to point to any such evidence in the record. There was no proof that the petitioner knew of any plan or purpose to effect any such transportation. There was not even any evidence that he was apprised of any need for seeking in other states for hostesses or entertainers for the La Paloma Club. Every fact and every circumstance relied on by the Government as evidence of the petitioner's guilt is thoroughly consistent with the hypothesis of his innocence.

At the conclusion of the Government's case in chief the petitioner moved (r. 458-462) the trial court to instruct the jury to return a verdict of acquittal. The motion was denied (r. 462). It was renewed (r. 653) at the conclusion of all of the evidence; and was again denied (r. 653).

The petitioner, before the jury's retirement, requested the trial court to give the jury several numbered instructions, among which were the following:

> "6. In this case some of the testimony relied upon by the government is from persons alleged in the indictment to have been accomplices of the defendant. As to such testimony the Court charges you that such testimony should be received with extreme caution."

"10. If you find from the evidence that the defendant, Fred Pine, had no knowledge of the transportation of the said women or girls, or some of them, or any intent that they or any of them were being, or would be so transported for the purpose alleged, it will be your duty to find for the defendant and your verdict should be 'not guilty.'"

"24. This is a case of what is known as circumstantial evidence, no witness having testified that he or she saw or heard the defendant conspiring, combining, confederating or agreeing together or with any other person or persons to commit any offense against the United States of America. The Government, therefore, as to the alleged conspiracy, combination, confederation or agreement, relies on circumstantial evidence solely. You are the sole and exclusive judges of the weight of the testimony and the evidence. Where the evidence is wholly circumstantial upon any material fact, the law is that while circumstantial evidence is capable of producing the highest degree of moral certainty, yet from its very nature it should have careful and patient consideration. The true test by which to determine the value of circumstantial evidence, in respect to its sufficiency to warrant a conviction in a criminal case, is not whether the proof establishes circumstances which are consistent or which coincide with the hypothesis or theory of the guilt of the accused, but whether the circumstances, satisfactorily established, are of a conclusive character and point so surely and unerringly to

the guilt of the accused as to exclude every reasonable hypothesis or theory of his innocence. The force of circumstantial evidence being exclusive in its character, the mere coincidence of a given number of circumstances with the hypothesis or theory of guilt, or the fact that such circumstances concur with, or render possible, the hypothesis or theory of the guilt of the accused, is not a reliable or admissible test, unless the circumstances arise to such a degree of cogency and force as in the order of natural cause and effect to exclude to a moral certainty every other hypothesis except the single one of guilt. The proof must not only coincide with the hypothesis of guilt, but it must be inconsistent with every other reasonable hypothesis."

"29. If the evidence convinces you to the exclusion of every reasonable doubt that the defendant Fred Pine and one or more of the persons named or referred to in the indictment as co-conspirators joined in a common purpose, design or understanding to effect or cause the transportation in interstate commerce of any of the women or girls named or referred to in the indictment for the purpose of employing them, or any of them, to work at the La Paloma Club, there will remain for your consideration and determination the question of whether the circumstances, surroundings and influences to which such employment would subject them were such as would tend to induce such women or girls, or any of them, to give themselves or herself up to a condition of debauchery which

eventually and naturally would lead them, or any of them, to a course of immorality sexually. Consequently, the maturity or immaturity and the experience or inexperience of such women or girls are material facts for your consideration."

The jury returned a verdict of guilty (r. 23). The petitioner's motion (r. 692-697) for a new trial was denied (r. 697) and he was adjudged guilty and sentenced to serve a term of two years' imprisonment and to pay a fine of $1,000 (r. 23-24).

The petitioner appealed (r. 24-25) to the United States Circuit Court of Appeals from the judgment of the district court.

Among the assignments of error relied on by the petitioner in the appellate court for a reversal of the trial court's judgment were the following: (a) The trial court erred in denying the petitioner's motion, made at the close of the Government's case in chief, and renewed at the conclusion of all of the evidence, for a directed verdict of not guilty; (b) the trial court erroneously refused to give the jury the instructions numbered 6, 10, 24 and 29 (quoted above) of the instructions requested by the petitioner; and (c) the trial court erred in denying the petitioner's motion for a new trial. The petitioner (in his brief) also directed the appellate court's attention to the pronounced, persistent and seriously prejudicial misconduct of the prosecuting attorneys reflected by the record and to the failure of the trial court to rebuke counsel for the Government, or to declare a mistrial, because of their misconduct of the case (although no assignment of error was predicated on such misconduct).

A remarkable incident occurred during the course of the oral argument of the case before the appellate court. The presiding judge several times asked the United States Attorney to point, if he could, to evidence in the record which showed that the petitioner had knowledge of any plan or purpose to effect the transportation in interstate commerce of the women and girls named in the indictment and in the bill of particulars. Pressed for an answer to the question from the bench, the United States Attorney **admitted** that the record reflected no such evidence. The admission (which was virtually a confession of error) concluded his argument. Not more than one-half of his allotted time had been consumed.

Nevertheless the judgment of conviction was affirmed (r. 722).

In its opinion (r. 712-721) the Circuit Court of Appeals held (a) that under the indictment (quoted above) it was not necessary to prove that the petitioner knew of, and became a party to, a conspiracy to effect the illegal transportation in interstate commerce of any of the women or girls named in the indictment and in the bill of particulars, but that it was proper and sufficient to show that he knew of, and became a party to, a general, comprehensive and continuing conspiracy to effect the illegal transportation in interstate commerce of women or girls whenever they should be needed or wanted as employees at the La Paloma Club (without having in contemplation the transportation of any specific woman or girl); and (b) that the evidence was sufficient to show that the petitioner knew of, and became a party to, such a general conspiracy.

We unhesitatingly and confidently assert, without disrespect, that the statement of the appellate court in its opinion that the record reflects evidence which warrants the conclusion that the petitioner knew of, and became a party to, such a general conspiracy is utterly unwarranted and baseless. We again challenge counsel for the Government to direct the Court's attention to any such evidence in the record. There was no more or better proof that the petitioner knew of any general, comprehensive and continuing plan or purpose to effect the future transportation and employment of women or girls whenever they should be needed or wanted than there was that he knew of any plan or purpose to effect the transportation and employment of the specific women and girls named in the indictment and in the bill of particulars.

The theory that it was not necessary to prove that the petitioner knew of, and became a party to, a conspiracy to effect the illegal transportation of any of the women or girls named in the indictment and in the bill of particulars, but that it was proper and sufficient to show that he knew of, and became a party to, a general, comprehensive and continuing conspiracy to effect the illegal transportation of women or girls whenever they should be needed or wanted (without having in contemplation the transportation of any specific woman or girl), is a theory which evidently was evolved by the appellate court. It was not advanced either in the brief filed in behalf of the Government or in the oral argument of the United States Attorney before the appellate court. Counsel for the petitioner have never been accorded the opportunity to submit their views (in opposition to such theory) fully and adequately by brief or oral argument.

In its opinion the appellate court held that the trial court's refusal to give the instruction numbered 6 (quoted above) was not reversible error because the charge was "couched in such general terms as to be misleading" and because "the judge charged fully on the weighing of evidence, and it was a matter within his discretion whether a charge as to accomplice testimony should be given."

The appellate court held that the trial court's refusal to give the instruction numbered 10 (quoted above) was not reversible error because "its effect was to charge as though the offense was the substantive one of actually transporting particular women and girls rather than the offense of conspiring to transport, and it was, therefore, confusing and incorrect."

The appellate court held that the instruction numbered 24 (quoted above) is a correct charge, but that the trial court's refusal to give it was not reversible error because "the court in the main charge did give a charge on circumstantial evidence correctly embodying the essentials of such charge."

The appellate court held that the trial court's refusal to give the instruction numbered 29 (quoted above) was not reversible error because "it was a wholly incorrect statement of the law."

The appellate court held that "the conduct of the prosecution did not constitute reversible error." The court said that "in view of the nature of the vigorous personal defense he [the petitioner] made and of the clash of personalities which was thus made inevitable,

it is plain that there was ample ground for anticipating, as well as basis for excusing, some by-play."

The misconduct of the prosecuting attorneys is again adverted to and discussed in the accompanying brief.

The petitioner sought a rehearing. His petition therefor (r. 723-735) was denied (r. 736).

He now seeks a review and determination of the cause by this Court and a reversal of the adverse judgment of the United States Circuit Court of Appeals for the Fifth Circuit.

STATEMENT OF STATUTORY BASIS FOR EXERCISE OF JURISDICTION

The statutory provisions which, it is believed, authorize the assumption and exercise of jurisdiction by this Court are the provisions of Section 347, Title 28, U. S. C. A.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. The opinion and decision of the Court in the case of Louis Athanasaw and Mitchell Sampson v. United States, 227 U. S. 326, 57 L. ed. 528, 33 S. C. 285, should be reconsidered; and the views expressed in such opinion should be receded from, or, at least, revised and clarified.

2. The decision of the United States Circuit Court of Appeals for the Fifth Circuit (because of its holding that, under an indictment wherein the petitioner was charged with having conspired with others to effect the

illegal transportation in interstate commerce of specific women and girls, it was proper and sufficient to show that he knew of, and became a party to, a general, comprehensive and continuing conspiracy to effect, at some indeterminate future time, the illegal transportation in interstate commerce of women or girls whenever they should be needed or wanted, without having in contemplation any specific woman or girl) is in conflict with the decision of the United States Circuit Court of Appeals for the Fourth Circuit, on the same matter, in the case of Rabens v. United States, 146 Fed. 978; and in conflict with the decision of the United States Circuit Court of Appeals for the Third Circuit, on the same matter, in the case of United States v. Wills, 36 Fed. (2d) 855.

3. In its decision the United States Circuit Court of Appeals for the Fifth Circuit (by its holding mentioned and referred to in the preceding paragraph numbered 2) has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by the trial court, as to call for the exercise by this Court of its power of supervision, because, under the indictment, as construed and interpreted by the said appellate court, and under the erroneous doctrine enunciated in such decision, a conviction would have been warranted if the proofs had shown either (a) that the petitioner committed the offense of conspiring with others to effect the illegal transportation in interstate commerce of any of the specific women and girls named in the indictment and in the bill of particulars or (b) that the petitioner committed the different offense of having entered into a general, comprehensive and continuing conspiracy to effect, at some future indeterminate time,

the illegal transportation in interstate commerce of women or girls whenever they should be needed or wanted, without having in contemplation any specific woman or girl; and because, as so construed and interpreted, the indictment is duplicitous and the petitioner was not sufficiently apprised, in conformity to the provisions of Article VI of the Amendments to the Federal Constitution, of the nature and cause of the accusation against him, and was denied due process of law and subjected to the danger of being twice put in jeopardy for the same offense in violation of the provisions of Article V of the Amendments to the Federal Constitution.

4. In its decision the United States Circuit Court of Appeals for the Fifth Circuit (by its holding that the evidence was sufficient to support the conclusion that the petitioner knew of, and became a party to, a general plan or conspiracy to transport women or girls unlawfully in interstate commerce) has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by the trial court, as to call for the exercise by this Court of its power of supervision, because such holding is arbitrary, unwarranted and utterly baseless (as an examination of the record will disclose).

5. The decision of the United States Circuit Court of Appeals for the Fifth Circuit (because of its holding that the trial court's refusal to give the instruction numbered 6, quoted above, of the instructions requested by the petitioner was not prejudicial and reversible error) is in conflict with the decision of the Court of Appeals of the District of Columbia, on the same matter, in the case of Freed v. United States, 266 Fed. 1012; and is

probably in conflict with the decisions of this Court, on the same matter, in the cases of Caminetti v. United States, 242 U. S. 470, 61 L. ed. 442, 37 S. C. 192, and Holmgren v. United States, 217 U. S. 509, 54 L. ed. 861, 30 S. C. 588.

6. In its decision the United States Circuit Court of Appeals for the Fifth Circuit (by its holding that the trial court's refusal to give the instruction numbered 10, quoted above, of the instructions requested by the petitioner was not prejudicial and reversible error) has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by the trial court, as to call for the exercise by this Court of its power of supervision, because in his general charge to the jury the trial judge did not, at any point, advise the jury in plain, simple and understandable language that the duty rested on the Government to prove guilty knowledge on the part of the petitioner of the alleged conspiracy, its objects and its purposes; and the petitioner, by requesting the giving of the instruction numbered 10, sought to have the trial judge instruct the jury in plain, simple and understandable language that if the petitioner had no knowledge of any plan or purpose to effect the illegal transportation in interstate commerce of women or girls he could not be guilty of conspiring to effect such transportation.

7. In its decision the United States Circuit Court of Appeals for the Fifth Circuit (by its holding that the trial court's refusal to give the instruction numbered 24, quoted above, of the instructions requested by the petitioner was not prejudicial and reversible error) has so far departed from the accepted and usual course of judi-

cial proceedings, and has so far sanctioned such a departure by the trial court, as to call for the exercise by this Court of its power of supervision, because the trial court's general charge as to circumstantial evidence was incomplete and inadequate and in giving it the trial court ignored certain important and well established legal principles which were embodied in the requested instruction, one of which is that "the true test by which to determine the value of circumstantial evidence, in respect to its sufficiency to warrant a conviction in a criminal case, is not whether the proof establishes circumstances which are consistent or which coincide with the hypothesis or theory of the guilt of the accused, but whether the circumstances, satisfactorily established, are of a conclusive character and point so surely and unerringly to the guilt of the accused as to exclude every reasonable hypothesis or theory of his innocence."

8. The decision of the United States Circuit Court of Appeals for the Fifth Circuit (because of its holding that the trial court's refusal to give the instruction numbered 29, quoted above, of the instructions requested by the petitioner was not prejudicial and reversible error) is in conflict with the decision of the United States Circuit Court of Appeals for the Seventh Circuit, on the same matter, in the case of United States v. Lewis, 110 Fed. (2d) 460.

9. The decision of the United States Circuit Court of Appeals for the Fifth Circuit (because of its holding that the pronounced, persistent and prejudicial misconduct of the prosecuting attorneys at and throughout the trial was excusable) is in conflict with the decisions of this Court, on the same matter, in the cases of Viereck v.

United States (decided March 1, 1943) and Berger v. United States, 295 U. S. 78, 79 L. ed. 1314, 55 S. C. 629.

THE QUESTIONS PRESENTED

The principal questions which are presented by the petition (and which are argued in the brief annexed) are:

1. Should not the opinion and decision of this Court in the case of Louis Athanasaw and Mitchell Sampson v. United States, 227 U. S. 326, 57 L. ed. 528, 33 S. C. 285 (wherein it apparently was held that it is violative of the Act of June 10, 1910, Section 397 et seq., Title 18, U. S. C. A., known as the White Slave Traffic Act, to procure or to aid the interstate transportation of a woman or girl for the purpose of employing her in such **surroundings** as would **tend** "to induce her to give herself up to a condition of debauchery which **eventually** and naturally **would lead her to** a course of immorality sexually"), be reconsidered and receded from, or, at least, revised and clarified, for the reasons that (a) by the provisions of the act, if it is to be so construed, the citizen is not informed with reasonable precision what conduct is prohibited so that he may have a certain ascertainable and understandable rule of conduct and may know what conduct it is his duty to avoid; (b) in each case where an indictment is sought, because of an alleged violation of the act as so construed, the grand jurors are licensed to create their own standards in determining whether the surroundings in question were such as **tended** to induce the woman or girl in question to give herself up to a condition of debauchery which **eventually** and naturally **would lead her to** a course of immorality sexually; (c) in each case where an indictment is returned, because of an

alleged violation of the act as so construed, the petit jurors are similarly licensed to create their own standards; (d) consequently the maturity or immaturity, the experience or inexperience and the sophistication or lack of sophistication of the woman or girl in question, as well as a number of other like factors, are material matters for the consideration of the grand and petit jurors; (e) such construction as apparently was given the act in the mentioned case is so vague, indefinite and uncertain that intelligent men are necessarily forced to guess as to its meaning and to honestly differ as to its application; and (f) such construction distorts the language of the act and is repugnant to, and violative of, the due process provisions of Articles V and VI of the Amendments to the Federal Constitution?

2. Where, at the trial of a defendant on an indictment wherein he was charged with having conspired with others to effect the illegal transportation in interstate commerce of specific women and girls for the purpose of employing them (in a night club) in such surroundings as would tend to induce them to give themselves up to a condition of debauchery which eventually and naturally would lead them to a course of immorality sexually, the Government failed to prove that the defendant knew of, and became a party to, any plan or agreement to effect the transportation of any of the specific women or girls named or referred to in the indictment, can his conviction be sustained even if the proofs showed that the defendant knew of, and became a party to, a general, comprehensive and continuing conspiracy to effect, at some indeterminate future time, the illegal transportation in interstate commerce of women or girls whenever they should be needed

or wanted, without having in contemplation any specific woman or girl?

3. If an indictment is so framed that under it a defendant may be convicted of either of two offenses (the offense of having conspired with others to effect the illegal transportation in interstate commerce of **specific** women and girls for the purpose of employing them in such surroundings as would tend to induce them to give themselves up to a condition of debauchery which eventually and naturally would lead them to a course of immorality sexually; or of the offense of having conspired with others to effect, at some indeterminate future time, the illegal transportation in interstate commerce of women and girls, whenever they should be needed or wanted, for the purpose of employing them in such surroundings, without having in contemplation the transportation of any **specific** woman or girl), or may be convicted of both of such offenses, should not the indictment be quashed, on timely and appropriate motion, because (a) it is duplicitous; (b) it does not sufficiently apprise the defendant, in conformity to the provisions of Article VI of the Amendments to the Federal Constitution, of the nature and cause of the accusation against him; and (c) the defendant, if prosecuted under such indictment, would be denied due process of law and subjected to the danger of being twice put in jeopardy for the same offense in violation of the provisions of Article V of the Amendments to the Federal Constitution?

4. Where, in a criminal case in which a defendant is charged with having conspired with others to effect the illegal transportation in interstate commerce of women and girls in violation of the provisions of the White Slave

Traffic Act, the evidence utterly fails to show that the defendant became a party to such conspiracy, and even fails to show that he had any knowledge of any plan or purpose to effect such transportation, is not the Supreme Court of the United States warranted in reversing a judgment of conviction, and should it not do so, when in timely and appropriate certiorari proceedings the insufficiency of the evidence is clearly and indisputably revealed by the record?

5. Where, in a prosecution for conspiring to effect the illegal transportation in interstate commerce of women and girls in violation of the White Slave Traffic Act, it is clearly and admittedly shown by the indictment and by the evidence that two Government witnesses, on whose testimony the Government mainly relies and without which the Government could not expect or hope to convict the accused, are co-conspirators and accomplices, is not the defendant entitled to a charge by which the jury shall be correctly instructed that "such testimony should be received with extreme caution"; and is not the refusal of the trial court to give such charge, or any charge of similar import, prejudicial and reversible error, particularly where there is grave and serious doubt as to the guilt of the accused and his testimony on every material point is in direct and sharp conflict with that of such witnesses?

6. In a prosecution for conspiring to effect the illegal transportation in interstate commerce of women and girls in violation of the White Slave Traffic Act, is not the defendant, who, in defense disclaims any knowledge of any plan or purpose to effect such transportation, entitled to a charge by which the jury shall be instructed in plain, simple, direct and understandable language that

if the accused had no knowledge of any plan or purpose to effect such transportation he could not be guilty of conspiring to effect such transportation; and is not the refusal of the trial court to give such charge, or any charge of similar import, prejudicial and reversible error, particularly where there is grave and serious doubt as to the guilt of the accused?

7. Where, in a prosecution for conspiracy to effect the illegal transportation in interstate commerce of women and girls in violation of the White Slave Traffic Act, the Government relies on circumstantial evidence solely (despite the fact that two of the defendant's alleged co-conspirators and accomplices testify willingly as Government witnesses, but are unable to give any direct or positive testimony that the accused knew of, and became a party to, the alleged conspiracy), is not the defendant entitled to a charge by which the jury shall be instructed that "the true test by which to determine the value of circumstantial evidence, in respect to its sufficiency to warrant a conviction in a criminal case, is not whether the proof establishes circumstances which are consistent or which coincide with the hypothesis or theory of the guilt of the accused, but whether the circumstances, satisfactorily established, are of a conclusive character and point so surely and unerringly to the guilt of the accused as to exclude every reasonable hypothesis or theory of his innocence"; and is not the refusal of the trial court to give such charge, or any charge in which the stated principle is clearly and adequately expressed, prejudicial and reversible error, particularly where there is grave and serious doubt as to the guilt of the accused?

8. In a prosecution for conspiring to effect the il-

legal transportation in interstate commerce of women and girls for the purpose of employing them in such surroundings as would tend to induce them to give themselves up to a condition of debauchery which eventually and naturally would lead them to a course of immorality sexually, are not the maturity or immaturity and the experience or inexperience of the women or girls (whose transportation it is alleged the defendant conspired to effect) material facts for the jury's consideration? And is not the accused entitled to a charge by which the jury shall be instructed that the maturity or immaturity and the experience or inexperience of such women and girls are material facts for the jury's consideration; and is not the trial court's refusal to give such charge prejudicial and reversible error, particularly where there arises from the evidence a grave and serious doubt as to whether the surroundings in question are such as would tend to induce the women and girls in question to give themselves up to a condition of debauchery which eventually and naturally would lead them to a course of immorality sexually?

9. Were not the bounds of propriety and fairness which should characterize the conduct of Government prosecuting attorneys in the prosecution of a criminal case overstepped in the instant case, to the prejudice of the petitioner, by the pronounced and persistent misconduct of the prosecuting attorneys in misstating facts in their examination of witnesses; in putting into the mouths of witnesses things which they had not said; in suggesting by their questions that statements had been made by witnesses which were not in fact made; by withholding important and material documentary evidence in the possession of the Government from the defendant; by insinuating that the original of a letter, an unsigned carbon

copy of which was introduced in evidence, had been signed by the defendant when they knew it had been signed by another person; by falsely representing to the trial court, in the jury's presence, that a material Government witness, who was under subpoena, was not available when in fact he was and by deliberately conveying to the jury the impression that the testimony of such witness would be favorable to the Government, but that the Government was deprived of such testimony because of the failure of the witness to remain in attendance; by purposely eliciting half-truths from witnesses and compelling the accused to assume the burden of eliciting the whole truth; by making numerous insinuations and assertions calculated to mislead the jury; in expressing in their cross-examination of the accused their personal and antagonistic views as to his character and conduct; by "bullying" and arguing with the accused during their cross-examination of him; and by engaging in other improper tactics and "strategy"? And should not the judgment of conviction be reversed because of such misconduct (although no assignment of error was predicated thereon), especially in view of the fact that the case was not strong and depended almost entirely on the testimony of alleged co-conspirators and accomplices?

REFERENCE TO RECORD

The petitioner presents to this Court, and files herewith as an exhibit hereto, a duly certified transcript of the entire record in the case, as the same appears in the United States Circuit Court of Appeals for the Fifth Circuit.

Respectfully submitted by

James M. Carson

James M. Carson

Vincent C. Giblin

Vincent C. Giblin

Counsel for the Petitioner.

June 21, 1943.

BRIEF IN SUPPORT OF PETITION

OPINIONS OF COURTS BELOW

There was no written opinion in the trial court.

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit (a copy of which is found at pages 711-721 of the record), filed April 26, 1943, has not yet been reported.

STATEMENT OF THE CASE

The case has been stated in the foregoing petition. To obviate repetition the Court is referred to the summary statement of the matters involved set forth in the petition.

SPECIFICATION OF ERRORS

1. The appellate court erred in holding that under the indictment (r. 1-2) it was not necessary to prove that the petitioner knew of, and became a party to, a conspiracy to effect the illegal transportation in interstate commerce of any of the women or girls named in the indictment and in the bill of particulars (r. 15-22), but that it was proper and sufficient to show that he knew of, and became a party to, a general, comprehensive and continuing conspiracy to effect the illegal transportation in interstate commerce of women and girls whenever they should be needed or wanted, without having in contemplation the transportation of any specific woman or girl.

2. The appellate court erred in holding that the evidence was sufficient to support a finding by the jury that the petitioner knew of, and became a party to, such a general conspiracy.

3. The appellate court erred in holding that the trial court's refusal to give the jury the instruction numbered 6 (r. 679) of the instructions requested by the petitioner was not prejudicial and reversible error.

4. The appellate court erred in holding that the trial court's refusal to give the jury the instruction numbered 10 (r. 682) of the instructions requested by the petitioner was not prejudicial and reversible error.

5. The appellate court erred in holding that the trial court's refusal to give the jury the instruction numbered 24 (r. 687) of the instructions requested by the petitioner was not prejudicial and reversible error.

6. The appellate court erred in holding that the trial court's refusal to give the jury the instruction numbered 29 (r. 691-692) of the instructions requested by the petitioner was not prejudicial and reversible error.

7. The appellate court erred in holding that the pronounced, persistent and prejudicial misconduct of the prosecuting attorneys at and throughout the trial was excusable and did not constitute a basis for the reversal of the trial court's judgment.

8. The appellate court erred in affirming the trial court's judgment (r. 23-24).

ARGUMENT OF QUESTIONS PRESENTED

I

SHOULD NOT THE OPINION AND DECISION OF THIS COURT IN THE CASE OF LOUIS ATHANASAW AND MITCHELL SAMPSON V. UNITED STATES, 227 U. S. 326, 57 L. ED. 528, 33 S. C. 285 (WHEREIN IT APPARENTLY WAS HELD THAT IT IS VIOLATIVE OF THE ACT OF JUNE 10, 1910, SECTION 397 ET SEQ., TITLE 18, U. S. C. A., KNOWN AS THE WHITE SLAVE TRAFFIC ACT, TO PROCURE OR TO AID THE INTERSTATE TRANSPORTATION OF A WOMAN OR GIRL FOR THE PURPOSE OF EMPLOYING HER IN SUCH **SURROUNDINGS** AS WOULD **TEND** "TO INDUCE HER TO GIVE HERSELF UP TO A CONDITION OF DEBAUCHERY WHICH **EVENTUALLY** AND NATURALLY **WOULD LEAD HER TO** A COURSE OF IMMORALITY SEXUALLY"), BE RECONSIDERED AND RECEDED FROM, OR, AT LEAST, REVISED AND CLARIFIED, FOR THE REASONS THAT (A) BY THE PROVISIONS OF THE ACT, IF IT IS TO BE SO CONSTRUED, THE CITIZEN IS NOT INFORMED WITH REASONABLE PRECISION WHAT CONDUCT IS PROHIBITED SO THAT HE MAY HAVE A CERTAIN ASCERTAINABLE AND UNDERSTANDABLE RULE OF CONDUCT AND MAY KNOW WHAT CONDUCT IT IS HIS DUTY TO AVOID; (B) IN EACH CASE WHERE AN INDICTMENT IS SOUGHT, BECAUSE OF AN ALLEGED VIOLATION OF THE ACT AS SO CONSTRUED, THE GRAND JURORS ARE LICENSED TO CREATE THEIR OWN STANDARDS IN DETERMINING WHETHER THE SURROUNDINGS IN QUESTION WERE SUCH AS **TENDED** TO INDUCE

THE WOMAN OR GIRL IN QUESTION TO GIVE HERSELF UP TO A CONDITION OF DEBAUCHERY WHICH **EVENTUALLY** AND NATURALLY **WOULD LEAD HER TO** A COURSE OF IMMORALITY SEXUALLY; (C) IN EACH CASE WHERE AN INDICTMENT IS RETURNED, BECAUSE OF AN ALLEGED VIOLATION OF THE ACT AS SO CONSTRUED, THE PETIT JURORS ARE SIMILARLY LICENSED TO CREATE THEIR OWN STANDARDS; (D) CONSEQUENTLY THE MATURITY OR IMMATURITY, THE EXPERIENCE OR INEXPERIENCE AND THE SOPHISTICATION OR LACK OF SOPHISTICATION OF THE WOMAN OR GIRL IN QUESTION, AS WELL AS A NUMBER OF OTHER LIKE FACTORS, ARE MATERIAL MATTERS FOR THE CONSIDERATION OF THE GRAND AND PETIT JURORS; (E) SUCH CONSTRUCTION AS APPARENTLY WAS GIVEN THE ACT IN THE MENTIONED CASE IS SO VAGUE, INDEFINITE AND UNCERTAIN THAT INTELLIGENT MEN ARE NECESSARILY FORCED TO GUESS AS TO ITS MEANING AND TO HONESTLY DIFFER AS TO ITS APPLICATION; AND (F) SUCH CONSTRUCTION DISTORTS THE LANGUAGE OF THE ACT AND IS REPUGNANT TO, AND VIOLATIVE OF, THE DUE PROCESS PROVISIONS OF ARTICLES V AND VI OF THE AMENDMENTS TO THE FEDERAL CONSTITUTION?

A logical approach to a consideration and determination of the stated first question is to indulge in the hypothesis that Congress (rather than the Court) had incorporated in the White Slave Traffic Act a provision by which Congress expressly declared it to be unlawful "to knowingly procure or to aid the interstate transporta-

tion of a woman or girl for the purpose of employing her in such surroundings as would tend to induce her to give herself up to a condition of debauchery which eventually and naturally would lead her to a course of immorality sexually."

Such a provision, it seems to us, would have been clearly repugnant to, and violative of, the due process provisions of Articles V and VI of the Amendments to the Federal Constitution, because Congress, in the exercise of its power to declare what shall constitute a crime or punishable offense, must inform the citizen with reasonable precision what acts it intends to prohibit, so that he may have a certain understandable rule of conduct and know what acts it is his duty to avoid. Champlin Ref. Co. v. Corporation Commission, 286 U. S. 210, 76 L. ed. 1062, 52 S. C. 559; Connally v. General Constr. Co., 269 U. S. 385, 70 L. ed. 322, 46 S. C. 126; United States v. L. Cohen Grocery Co., 255 U. S. 81, 65 L. ed. 516, 41 S. C. 298; James v. Bowman, 190 U. S. 127, 47 L. ed. 979, 23 S. C. 678; Northern P. R. Co. v. United States (C. C. A. 8), 213 Fed. 162, affirmed in 242 U. S. 190, 61 L. ed. 240, 37 S. C. 22; United States v. Brewer, 139 U. S. 278, 35 L. ed. 190, 11 S. C. 538.

The due process provisions of Articles V and VI of the Amendments to the Federal Constitution require an ascertainable standard of guilt (fixed by Congress rather than by courts or juries) and secure to accused persons the right to be informed of the nature and cause of accusations against them. Accordingly, a criminal statute enacted by Congress must define with reasonable precision the act to be punished. If the statute licenses the jury to create its own standard of guilt in each case, it

is unconstitutional and void. United States v. L. Cohen Grocery Co., supra; Herndon v. Lowry, 301 U. S. 261, 81 L. ed. 1077, 57 S. C. 732.

A statute which forbids the doing of an act in terms so vague that men of common intelligence must guess as to its meaning and differ as to its application lacks the first essential of due process of law. Champlin Ref. Co. v. Corporation Commission, supra; Connally v. General Constr. Co., supra.

The quoted hypothetical provision is not found in the White Slave Traffic Act. But by its construction of the act in the case of Louis Athanasaw and Mitchell Sampson v. United States, supra, the Court has apparently injected it into the statute; and if the act is to be construed as if it embraced such a provision it is utterly impossible for any citizen or for any lawyer to determine, with any approximation to precision, what surroundings (if any) would have such a seductive influence on any woman or girl as to **tend** to **induce** her, if employed therein, to give herself up to a condition of debauchery which would **eventually** and naturally lead her to a course of immorality sexually. It is difficult, if not impossible, to conceive of any surroundings which would exert such seductive influence on every woman or girl who should be employed to work in them. The surroundings which would have an evil influence on one woman or girl would have no detrimental effect whatever on another. Lewis v. United States (C. C. A. 7), 110 Fed. (2d) 460.

Whether the employment of a particular woman or girl in certain surroundings, would have a **tendency** to induce her to give herself up to a condition of debauchery

which would eventually and naturally lead her to a course of immorality sexually, is a question which the citizen and his lawyer (with the aid and advice of psychologists and psychiatrists) could not safely determine, and the citizen would be obliged to act at his peril, because both the grand and petit jurors, who are licensed to create their own standards if the act in question is to be construed as it apparently was in the case referred to, might disagree with the composite judgment of the citizen and his expert advisers.

The White Slave Traffic Act is clear and understandable and it fixes an ascertainable standard of guilt. It provides that "any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting in interstate commerce, . . . any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice, . . . shall be deemed guilty of a felony."

It is axiomatic that statutes creating and defining crimes cannot be extended by intendment. Todd v. United States, 158 U. S. 278, 39 L. ed. 982, 15 S. C. 889. Before a man can be punished his conduct must be plainly and unmistakably within a statute. United States v. Resnick, 299 U. S. 207, 81 L. ed. 127, 57 S. C. 126; Donnelley v. United States, 276 U. S. 505, 72 L. ed. 676, 48 S. C. 400; United States v. Bathgate, 246 U. S. 220, 62 L. ed. 676, 38 S. C. 269; United States v. Gradwell, 243 U. S. 476, 61 L. ed. 857, 37 S. C. 407; United States v. George, 228 U. S. 14, 57 L. ed. 712, 33 S. C. 412; Todd v. United States, supra;

United States v. Brewer, 139 U. S. 278, 35 L. ed. 190, 11 S. C. 538; United States v. Lacher, 134 U. S. 624, 33 L. ed. 1080, 10 S. C. 625.

The Court, in the case of Louis Athanasaw and Mitchell Sampson v. United States, supra, has apparently extended by intendment the clear provisions of the White Slave Traffic Act; and has apparently, by construction, brought within the provisions of the act cases which were certainly not theretofore within such provisions.

It should be noted that in the case referred to the indictment (which has been examined by the writers of this brief) followed the language of the White Slave Traffic Act. The indictment was good.

In the instant case, however, the language of the act was departed from in the indictment; and its draftsman culled from the Court's opinion in the case referred to certain language (which dealt with the evidence adduced in support of the charge) and employed such language in the indictment against the petitioner.

If the Court, in the case referred to, meant to, and did, construe the White Slave Traffic Act as making it unlawful "to procure or to aid the interstate transportation of a woman or girl for the purpose of employing her in such surroundings as would tend to induce her to give herself up to a condition of debauchery which eventually and naturally would lead her to a course of immorality sexually" (which is substantially the language which was employed in the indictment in the instant case), we submit that the Court's opinion and decision should be receded from and overruled.

On the other hand, if the Court did not mean to, and did not, so construe the act, the indictment in the instant case did not charge the petitioner with any conduct within the act and his conviction should not be allowed to stand.

II

WHERE, AT THE TRIAL OF A DEFENDANT ON AN INDICTMENT WHEREIN HE WAS CHARGED WITH HAVING CONSPIRED WITH OTHERS TO EFFECT THE ILLEGAL TRANSPORTATION IN INTERSTATE COMMERCE OF SPECIFIC WOMEN AND GIRLS FOR THE PURPOSE OF EMPLOYING THEM (IN A NIGHT CLUB) IN SUCH SURROUNDINGS AS WOULD TEND TO INDUCE THEM TO GIVE THEMSELVES UP TO A CONDITION OF DEBAUCHERY WHICH EVENTUALLY AND NATURALLY WOULD LEAD THEM TO A COURSE OF IMMORALITY SEXUALLY, THE GOVERNMENT FAILED TO PROVE THAT THE DEFENDANT KNEW OF, AND BECAME A PARTY TO, ANY PLAN OR AGREEMENT TO EFFECT THE TRANSPORTATION OF ANY OF THE SPECIFIC WOMEN OR GIRLS NAMED OR REFERRED TO IN THE INDICTMENT, CAN HIS CONVICTION BE SUSTAINED EVEN IF THE PROOFS SHOWED THAT THE DEFENDANT KNEW OF, AND BECAME A PARTY TO, A GENERAL, COMPREHENSIVE AND CONTINUING CONSPIRACY TO EFFECT, AT SOME INDETERMINATE FUTURE TIME, THE ILLEGAL TRANSPORTATION IN INTERSTATE COMMERCE OF WOMEN OR GIRLS WHENEVER THEY SHOULD BE NEEDED OR WANTED, WITHOUT HAVING IN CONTEMPLATION ANY SPECIFIC WOMAN OR GIRL?

In the indictment (r. 1-4) it was charged that the petitioner and others conspired "to unlawfully, wilfully, knowingly and feloniously transport and cause to be transported and aid and assist in obtaining transportation for and transporting in interstate commerce from Chattanooga, Tennessee, Atlanta, Georgia, and divers other places to the grand jurors unknown, to Dade County, State of Florida, certain women and girls, to-wit: Mary Agnes McCullar, Frances Pauline McCullar, Billie Johnson, Ann Bennett, Jessie Asher, Betty Martin Tinker and Frances Jobe, sometimes known as Frances Hollborn, and divers and sundry other women and girls whose **names** are to the grand jurors unknown."

The grand jurors, therefore, charged the petitioner with having conspired to effect the illegal transportation in interstate commerce of certain **specific** persons (some of whose **names** were known and some of whose **names** were not known to the jurors); and the grand jurors did not charge him with having entered into a general, comprehensive and continuing conspiracy to effect the illegal transportation in interstate commerce of women or girls whenever they should be needed or wanted.

The petitioner moved (r. 7-9) in the trial court for the entry of an order by which the Government should be directed and required to file and to furnish to him a bill of particulars in and by which the Government should specify, "with reasonable certainty and definiteness, the names of any women or girls other than Mary Agnes McCullar, Frances Pauline McCullar, Billie Johnson, Ann Bennett, Jessie Asher, Betty Martin Tinker and Frances Jobe [the women or girls whose names were known to the grand jurors], to effect the illegal transportation

of whom the Government expects to prove the defendant conspired." The motion was granted (r. 13-15) and the Government in its bill of particulars (r. 15-22) added only the name of Rachel Louise Clark to the list of the names of women or girls set forth in the indictment.

The petitioner, who had the right under and by virtue of the provisions of Article VI of the Amendments to the Constitution of the United States, to be apprised of the nature and cause of the offense which the Government expected to prove he committed, was not informed that, under the indictment, the Government, on its failure to prove that he conspired to effect the illegal transportation in interstate commerce of Mary Agnes McCullar, Frances Pauline McCullar, Billie Johnson, Ann Bennett, Jessie Asher, Betty Martin Tinker, Frances Jobe and Rachel Louise Clark, or any of them, would adopt and rely on the theory that the evidence was sufficient to show a general, comprehensive and continuing conspiracy to effect the illegal transportation in interstate commerce of women or girls whenever they should be needed or wanted.

The Government admittedly failed to prove that the petitioner conspired to effect the illegal transportation in interstate commerce of any of the women or girls named in the indictment and in the bill of particulars because (as the United States Attorney was forced to admit during the oral argument of the cause in the appellate court) there was no evidence that the petitioner had any knowledge of, or information as to, any plan or purpose to effect the transportation of any of such women or girls.

The theory that it was not necessary to prove that the petitioner knew of the purpose to transport or the actual transportation "of any particular girl or woman" and that it was sufficient to show that he knew of, and was a party to, a **general**, comprehensive and continuing conspiracy to effect the illegal transportation in interstate commerce of women or girls whenever they should be needed or wanted, is a theory which evidently was evolved by the appellate court. The theory was not advanced either in the brief filed in behalf of the Government or in the oral argument of the United States Attorney before the appellate court. Counsel for the petitioner were not accorded the opportunity to submit their views (in opposition to such theory) fully and adequately by brief or oral argument.

If the judgment of the appellate court shall not be reversed, the petitioner will have been convicted of an offense with the commission of which the grand jurors did not charge or intend to charge him, and of the nature and character of which the petitioner was never informed until the appellate court rendered its opinion on April 26, 1943; and by such judgment the petitioner will be deprived of the right guaranteed to him in and by the provisions of Article VI of the Amendments to the Constitution of the United States "to be informed of the nature and cause of the accusation against him."

In the case of Rabens v. United States (C. C. A. 4), 146 Fed. 978, it was held that where an accused was indicted for a conspiracy to rob a specific post office, he could not be convicted, when the evidence failed to show that he had conspired to rob the specific post office named in the indictment, of a general conspiracy to rob banks

and "everything that was robbable." The court observed that "the district attorney could undoubtedly have charged a general conspiracy to rob," but that "he did not see fit to do so, but elected to rely upon the specific charge of a conspiracy to rob the post office at Latta."

The decision of the appellate court in the instant case is in direct conflict with the decision of the United States Circuit Court of Appeals for the Fourth Circuit in the cited case.

We submit that the decision in the cited case is founded on the well established principle of law that a defendant in a criminal case may not be charged with one offense and convicted of another.

In the case of United States v. Wills (C. C. A. 3), 36 Fed. (2d) 855, the defendants were charged with a general comprehensive conspiracy, and the Government proved "sundry small conspiracies," but was unable to prove the alleged general conspiracy. The court held that the trial judge "properly directed an acquittal" on the ground that there was a variance between the allegations of the indictment and the proof. The court cited, with approval, the case of Rabens v. United States, supra.

III

IF AN INDICTMENT IS SO FRAMED THAT UNDER IT A DEFENDANT MAY BE CONVICTED OF EITHER OF TWO OFFENSES (THE OFFENSE OF HAVING CONSPIRED WITH OTHERS TO EFFECT THE ILLEGAL TRANSPORTATION IN INTERSTATE

COMMERCE OF **SPECIFIC** WOMEN AND GIRLS FOR THE PURPOSE OF EMPLOYING THEM IN SUCH SURROUNDINGS AS WOULD TEND TO INDUCE THEM TO GIVE THEMSELVES UP TO A CONDITION OF DEBAUCHERY WHICH EVENTUALLY AND NATURALLY WOULD LEAD THEM TO A COURSE OF IMMORALITY SEXUALLY; OR OF THE OFFENSE OF HAVING CONSPIRED WITH OTHERS TO EFFECT, AT SOME INDETERMINATE FUTURE TIME, THE ILLEGAL TRANSPORTATION IN INTERSTATE COMMERCE OF WOMEN AND GIRLS, WHENEVER THEY SHOULD BE NEEDED OR WANTED, FOR THE PURPOSE OF EMPLOYING THEM IN SUCH SURROUNDINGS, WITHOUT HAVING IN CONTEMPLATION THE TRANSPORTATION OF ANY **SPECIFIC** WOMAN OR GIRL), OR MAY BE CONVICTED OF BOTH OF SUCH OFFENSES, SHOULD NOT THE INDICTMENT BE QUASHED, ON TIMELY AND APPROPRIATE MOTION, BECAUSE (A) IT IS DUPLICITOUS; (B) IT DOES NOT SUFFICIENTLY APPRISE THE DEFENDANT, IN CONFORMITY TO THE PROVISIONS OF ARTICLE VI OF THE AMENDMENTS TO THE FEDERAL CONSTITUTION, OF THE NATURE AND CAUSE OF THE ACCUSATION AGAINST HIM; AND (C) THE DEFENDANT, IF PROSECUTED UNDER SUCH INDICTMENT, WOULD BE DENIED DUE PROCESS OF LAW AND SUBJECTED TO THE DANGER OF BEING TWICE PUT IN JEOPARDY FOR THE SAME OFFENSE IN VIOLATION OF THE PROVISIONS OF ARTICLE V OF THE AMENDMENTS TO THE FEDERAL CONSTITUTION?

It seems to us that the question itself suggests the

answer to it; and that no argument need be advanced or authorities cited in support of our contention that the question should be affirmatively answered.

IV

WHERE, IN A CRIMINAL CASE IN WHICH A DEFENDANT IS CHARGED WITH HAVING CONSPIRED WITH OTHERS TO EFFECT THE ILLEGAL TRANSPORTATION IN INTERSTATE COMMERCE OF WOMEN AND GIRLS IN VIOLATION OF THE PROVISIONS OF THE WHITE SLAVE TRAFFIC ACT, THE EVIDENCE UTTERLY FAILS TO SHOW THAT THE DEFENDANT BECAME A PARTY TO SUCH CONSPIRACY, AND EVEN FAILS TO SHOW THAT HE HAD ANY KNOWLEDGE OF ANY PLAN OR PURPOSE TO EFFECT SUCH TRANSPORTATION, IS NOT THE SUPREME COURT OF THE UNITED STATES WARRANTED IN REVERSING A JUDGMENT OF CONVICTION, AND SHOULD IT NOT DO SO, WHEN IN TIMELY AND APPROPRIATE CERTIORARI PROCEEDINGS THE INSUFFICIENCY OF THE EVIDENCE IS CLEARLY AND INDISPUTABLY REVEALED BY THE RECORD?

In holding and deciding that the evidence was sufficient to warrant the jury's finding that the petitioner knew of, and was a party to, a general, comprehensive and continuing conspiracy to effect the illegal transportation in interstate commerce of women and girls whenever they should be needed or wanted, without having in contemplation the transportation of any specific woman or

girl, the appellate court utterly ignored or disregarded the evidence, which wholly fails to provide any basis or predicate for such holding or decision.

It would extend the brief to an undue length if we should review and analyze in the brief all of the evidence (r. 33-653). We earnestly invite and solicit a thorough and microscopic examination by the Court of the transcript of the evidence. Such examination will disclose that there is no evidentiary basis for the petitioner's conviction. Nothing which the petitioner did and nothing which he said throughout the entire period during which he was connected with the night club in question was done or said for the purpose of furthering any plan or conspiracy to effect the illegal transportation of women or girls in interstate commerce. The evidence fails to reveal that he had any knowledge of any such plan or conspiracy.

The arbitrary, unwarranted and utterly baseless statement by the appellate court in its opinion that the evidence was sufficient is surely not a bar to this Court's reversing the judgment of the appellate court when the insufficiency of the evidence is clearly and indisputably revealed by the record.

V

WHERE, IN A PROSECUTION FOR CONSPIRING TO EFFECT THE ILLEGAL TRANSPORTATION IN INTERSTATE COMMERCE OF WOMEN AND GIRLS IN VIOLATION OF THE WHITE SLAVE TRAFFIC ACT, IT IS CLEARLY AND ADMITTEDLY SHOWN BY

THE INDICTMENT AND BY THE EVIDENCE THAT TWO GOVERNMENT WITNESSES, ON WHOSE TESTIMONY THE GOVERNMENT MAINLY RELIES AND WITHOUT WHICH THE GOVERNMENT COULD NOT EXPECT OR HOPE TO CONVICT THE ACCUSED, ARE CO-CONSPIRATORS AND ACCOMPLICES, IS NOT THE DEFENDANT ENTITLED TO A CHARGE BY WHICH THE JURY SHALL BE CORRECTLY INSTRUCTED THAT "SUCH TESTIMONY SHOULD BE RECEIVED WITH EXTREME CAUTION"; AND IS NOT THE REFUSAL OF THE TRIAL COURT TO GIVE SUCH CHARGE, OR ANY CHARGE OF SIMILAR IMPORT, PREJUDICIAL AND REVERSIBLE ERROR, PARTICULARLY WHERE THERE IS GRAVE AND SERIOUS DOUBT AS TO THE GUILT OF THE ACCUSED AND HIS TESTIMONY ON EVERY MATERIAL POINT IS IN DIRECT AND SHARP CONFLICT WITH THAT OF SUCH WITNESSES?

The stated fifth question has been affirmatively answered by the Court of Appeals of the District of Columbia in the case of Freed v. United States, 266 Fed. 1012, decided after this Court had decided the cases of Caminetti v. United States, 242 U. S. 470, 61 L. ed. 442, 37 S. C. 192, and Holmgren v. United States, 217 U. S. 509, 54 L. ed. 861, 30 S. C. 588 (which were cited, discussed and analyzed by the Court of Appeals in its opinion in the cited case).

The decision of the appellate court in the instant case, because of the court's sanctioning the trial court's refusal to give the instruction numbered 6 (quoted in the foregoing petition) of the instructions requested by the

petitioner, is in direct conflict with the decision
Court of Appeals of the District of Columbia in the
case.

We believe and contend that in the court's o
in the cited case the law is well and correctly state

VI

IN A PROSECUTION FOR CONSPIRING T
FECT THE ILLEGAL TRANSPORTATION IN IN
STATE COMMERCE OF WOMEN AND GIRLS IN
LATION OF THE WHITE SLAVE TRAFFIC A
NOT THE DEFENDANT, WHO, IN DEFENSE
CLAIMS ANY KNOWLEDGE OF ANY PLAN OR
POSE TO EFFECT SUCH TRANSPORTATION
TITLED TO A CHARGE BY WHICH THE JURY S
BE INSTRUCTED IN PLAIN, SIMPLE, DIRECT
UNDERSTANDABLE LANGUAGE THAT IF TH
CUSED HAD NO KNOWLEDGE OF ANY PLA
PURPOSE TO EFFECT SUCH TRANSPORTATIO
COULD NOT BE GUILTY OF CONSPIRING T
FECT SUCH TRANSPORTATION; AND IS NOT
REFUSAL OF THE TRIAL COURT TO GIVE
CHARGE, OR ANY CHARGE OF SIMILAR IM
PREJUDICIAL AND REVERSIBLE ERROR,
TICULARLY WHERE THERE IS GRAVE AND
OUS DOUBT AS TO THE GUILT OF THE ACCU

The Court's general charge may be found at
654-676 of the record. An examination of the charg
disclose that the trial court nowhere instructed the

in plain, simple, direct and understandable language that if the petitioner had no knowledge of any plan or purpose to effect the illegal transportation in interstate commerce of women or girls he could not be guilty of conspiring to effect such transportation.

One cannot be guilty of criminally conspiring to do something unless he knows what it is which is to be done or attempted. The petitioner wanted the trial judge to tell the jury so in language which the average juror could readily understand. The refused instruction numbered 10 was designed to accomplish the petitioner's purpose; and we think that the instruction, or a similar charge, should have been given.

VII

WHERE, IN A PROSECUTION FOR CONSPIRACY TO EFFECT THE ILLEGAL TRANSPORTATION IN INTERSTATE COMMERCE OF WOMEN AND GIRLS IN VIOLATION OF THE WHITE SLAVE TRAFFIC ACT, THE GOVERNMENT RELIES ON CIRCUMSTANTIAL EVIDENCE SOLELY (DESPITE THE FACT THAT TWO OF THE DEFENDANT'S ALLEGED CO-CONSPIRATORS AND ACCOMPLICES TESTIFY WILLINGLY AS GOVERNMENT WITNESSES, BUT ARE UNABLE TO GIVE ANY DIRECT OR POSITIVE TESTIMONY THAT THE ACCUSED KNEW OF, AND BECAME A PARTY TO, THE ALLEGED CONSPIRACY), IS NOT THE DEFENDANT ENTITLED TO A CHARGE BY WHICH THE JURY SHALL BE INSTRUCTED THAT "THE TRUE TEST BY WHICH TO DETERMINE THE VALUE OF CIRCUMSTANTIAL

EVIDENCE, IN RESPECT TO ITS SUFFICIENCY TO WARRANT A CONVICTION IN A CRIMINAL CASE, IS NOT WHETHER THE PROOF ESTABLISHES CIRCUMSTANCES WHICH ARE CONSISTENT OR WHICH COINCIDE WITH THE HYPOTHESIS OR THEORY OF THE GUILT OF THE ACCUSED, BUT WHETHER THE CIRCUMSTANCES, SATISFACTORILY ESTABLISHED, ARE OF A CONCLUSIVE CHARACTER AND POINT SO SURELY AND UNERRINGLY TO THE GUILT OF THE ACCUSED AS TO EXCLUDE EVERY REASONABLE HYPOTHESIS OR THEORY OF HIS INNOCENCE"; AND IS NOT THE REFUSAL OF THE TRIAL COURT TO GIVE SUCH CHARGE, OR ANY CHARGE IN WHICH THE STATED PRINCIPLE IS CLEARLY AND ADEQUATELY EXPRESSED, PREJUDICIAL AND REVERSIBLE ERROR, PARTICULARLY WHERE THERE IS GRAVE AND SERIOUS DOUBT AS TO THE GUILT OF THE ACCUSED?

The case, because of the character of the evidence adduced against the petitioner, demanded a clear, complete and adequate charge on circumstantial evidence. The trial court's general charge (r. 654-676) fell far short of being a satisfactory and elucidative exposition of the law of circumstantial evidence.

It was of vital importance to the petitioner that the jurors be advised and that they understand that "the true test by which to determine the value of circumstantial evidence, in respect to its sufficiency to warrant a conviction in a criminal case, is not whether the proof establishes circumstances which are consistent or which

coincide with the hypothesis or theory of the guilt of the accused, but whether the circumstances, satisfactorily established, are of a conclusive character and point so surely and unerringly to the guilt of the accused as to exclude every reasonable hypothesis or theory of his innocence." It was especially and peculiarly important that the jurors be so advised because of the fact that two of the petitioner's alleged co-conspirators and accomplices testified willingly for the Government, but were unable to give any direct or positive testimony that the petitioner had conspired with them, or with any of the alleged co-conspirators, to effect the interstate transportation of any women or girls.

The appellate court held that the refused instruction numbered 24 is a correct charge. If it is (and there can be no doubt that it is) it should have been given; and the trial court, in refusing to give it, failed to accord to the petitioner the protection and the safeguards to which he was entitled.

VIII

IN A PROSECUTION FOR CONSPIRING TO EFFECT THE ILLEGAL TRANSPORTATION IN INTERSTATE COMMERCE OF WOMEN AND GIRLS FOR THE PURPOSE OF EMPLOYING THEM IN SUCH SURROUNDINGS AS WOULD TEND TO INDUCE THEM TO GIVE THEMSELVES UP TO A CONDITION OF DEBAUCHERY WHICH EVENTUALLY AND NATURALLY WOULD LEAD THEM TO A COURSE OF IMMORALITY SEXUALLY, ARE NOT THE MATURITY OR IMMATURITY AND THE EXPERIENCE

OR INEXPERIENCE OF THE WOMEN OR GIRLS (WHOSE TRANSPORTATION IT IS ALLEGED THE DEFENDANT CONSPIRED TO EFFECT) MATERIAL FACTS FOR THE JURY'S CONSIDERATION? AND IS NOT THE ACCUSED ENTITLED TO A CHARGE BY WHICH THE JURY SHALL BE INSTRUCTED THAT THE MATURITY OR IMMATURITY AND THE EXPERIENCE OR INEXPERIENCE OF SUCH WOMEN AND GIRLS ARE MATERIAL FACTS FOR THE JURY'S CONSIDERATION; AND IS NOT THE TRIAL COURT'S REFUSAL TO GIVE SUCH CHARGE PREJUDICIAL AND REVERSIBLE ERROR, PARTICULARLY WHERE THERE ARISES FROM THE EVIDENCE A GRAVE AND SERIOUS DOUBT AS TO WHETHER THE SURROUNDINGS IN QUESTION ARE SUCH AS WOULD TEND TO INDUCE THE WOMEN AND GIRLS IN QUESTION TO GIVE THEMSELVES UP TO A CONDITION OF DEBAUCHERY WHICH EVENTUALLY AND NATURALLY WOULD LEAD THEM TO A COURSE OF IMMORALITY SEXUALLY?

The stated eighth question has been affirmatively answered by the United States Circuit Court of Appeals for the Seventh Circuit in the case of United States v. Lewis, 110 Fed. (2d) 460.

The cited case was one in which the defendants were charged in the language of the White Slave Traffic Act with having unlawfully transported in interstate commerce girls "with the unlawful and felonious intent and purpose" . . . that the girls should "engage in an immoral practice, to-wit, prostitution and debuachery" (language

vastly different from that used in the indictment in the instant case). The proof in part was similar to that in the instant case. The girls involved in the cited case were employed by the defendants to take part in public exhibitions which the defendants furnished as a part of the entertainment features of a traveling carnival. The theme of the exhibition in which the girls took part was essentially sex, and its medium of expression was nudity accompanied by words and pantomine which emphasized sexual action. The court said (on the point presented by the stated eighth question):

> "Here, as in the Athanasaw case, the deciding question, apart from the fact of transportation, is whether the circumstances, surroundings and influences to which the employment subjected them tended to induce them to give themselves up 'to a condition of debauchery which eventually and naturally would lead to a course of immorality sexually.' Consequently, **the immaturity and inexperience of the girls were material facts for the consideration of the jury.** If, instead of immature and inexperienced girls the defendants had been charged with transporting mature women, who had had experience in public exhibitions of the type involved in this case, the jury necessarily would have taken that into consideration in deciding whether the employment with its surroundings and influences would have tended to induce them to give themselves up to a condition of debauchery 'which eventually and naturally would lead to a course of immorality sexually.'"

The appellate court in the instant case held that the instruction numbered 29 of the instructions requested by the petitioner, which was based on the quoted language of the court in the cited case, "was a wholly incorrect statement of the law."

By such holding the court placed itself in direct conflict with the United States Circuit Court of Appeals for the Seventh Circuit.

IX

WERE NOT THE BOUNDS OF PROPRIETY AND FAIRNESS WHICH SHOULD CHARACTERIZE THE CONDUCT OF GOVERNMENT PROSECUTING ATTORNEYS IN THE PROSECUTION OF A CRIMINAL CASE OVERSTEPPED IN THE INSTANT CASE, TO THE PREJUDICE OF THE PETITIONER, BY THE PRONOUNCED AND PERSISTENT MISCONDUCT OF THE PROSECUTING ATTORNEYS IN MISSTATING FACTS IN THEIR EXAMINATION OF WITNESSES; IN PUTTING INTO THE MOUTHS OF WITNESSES THINGS WHICH THEY HAD NOT SAID; IN SUGGESTING BY THEIR QUESTIONS THAT STATEMENTS HAD BEEN MADE BY WITNESSES WHICH WERE NOT IN FACT MADE; BY WITHHOLDING IMPORTANT AND MATERIAL DOCUMENTARY EVIDENCE IN THE POSSESSION OF THE GOVERNMENT FROM THE DEFENDANT; BY INSINUATING THAT THE ORIGINAL OF A LETTER, AN UNSIGNED CARBON COPY OF WHICH WAS INTRODUCED IN EVIDENCE, HAD BEEN SIGNED BY THE DEFENDANT WHEN THEY KNEW IT HAD BEEN SIGNED

BY ANOTHER PERSON; BY FALSELY REPRESENTING TO THE TRIAL COURT, IN THE JURY'S PRESENCE, THAT A MATERIAL GOVERNMENT WITNESS, WHO WAS UNDER SUBPOENA, WAS NOT AVAILABLE WHEN IN FACT HE WAS AND BY DELIBERATELY CONVEYING TO THE JURY THE IMPRESSION THAT THE TESTIMONY OF SUCH WITNESS WOULD BE FAVORABLE TO THE GOVERNMENT, BUT THAT THE GOVERNMENT WAS DEPRIVED OF SUCH TESTIMONY BECAUSE OF THE FAILURE OF THE WITNESS TO REMAIN IN ATTENDANCE; BY PURPOSELY ELICITING HALF-TRUTHS FROM WITNESSES AND COMPELLING THE ACCUSED TO ASSUME THE BURDEN OF ELICITING THE WHOLE TRUTH; BY MAKING NUMEROUS INSINUATIONS AND ASSERTIONS CALCULATED TO MISLEAD THE JURY; IN EXPRESSING IN THEIR CROSS-EXAMINATION OF THE ACCUSED THEIR PERSONAL AND ANTAGONISTIC VIEWS AS TO HIS CHARACTER AND CONDUCT; BY "BULLYING" AND ARGUING WITH THE ACCUSED DURING THEIR CROSS-EXAMINATION OF HIM; AND BY ENGAGING IN OTHER IMPROPER TACTICS AND "STRATEGY"? AND SHOULD NOT THE JUDGMENT OF CONVICTION BE REVERSED BECAUSE OF SUCH MISCONDUCT (ALTHOUGH NO ASSIGNMENT OF ERROR WAS PREDICATED THEREON), ESPECIALLY IN VIEW OF THE FACT THAT THE CASE WAS NOT STRONG AND DEPENDED ALMOST ENTIRELY ON THE TESTIMONY OF ALLEGED CO-CONSPIRATORS AND ACCOMPLICES?

It is impossible to narrate and review in detail in this

brief all of the instances of misconduct on the part of the prosecuting attorneys unless we should abandon all effort to achieve brevity. At pages 41, 59, 191, 201, 319, 320, 357, 368, 369, 409, 410, 456-458, 529, 533, 534, 600, 606, 611, 615, 618, 622, 623, 625, 627, 629, 631, 634-638, 640 and 641 some of the misconduct of the prosecuting attorneys is reflected.

In the cases of Viereck v. United States (decided March 1, 1943) and Berger v. United States, 295 U. S. 78, 79 L. ed. 1314, 55 S. C. 629, the Court condemned misconduct of prosecutors which was no more flagrant or reprehensible than that involved in the instant case.

CONCLUSION

If the words inscribed over the entrance to the magnificent edifice which houses the nation's highest tribunal—"EQUAL JUSTICE UNDER THE LAW"—are not a meaningless and hypocritical expression of a discarded ideal, this Court ought to seize the opportunity to remedy the abominable and intolerable injustice to which the petitioner has been subjected. Tried for "the sins of a lifetime" on an indictment which was regarded by the trial court and the prosecuting attorneys as an omnibus charge under which anything and everything could be proved, in an intensely prejudicial atmosphere accentuated by the misconduct of counsel for the Government, he is a victim of the dangerous philosophy that "the end justifies the means."

We sincerely and conscientiously plead that the law of the land be applied in the interest of the petitioner;

and that the judgment of the United States Circuit Court of Appeals for the Fifth Circuit be reversed.

Respectfully submitted by

James M. Carson

Vincent C. Giblin

Counsel for the Petitioner.

June 21, 1943.

No. 111

In the Supreme Court of the United States

OCTOBER TERM, 1943

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 111

FRED PINE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 711–719) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered April 26, 1943 (R. 719), and a petition for rehearing (R. 719–729) was denied May 25, 1943 (R. 729). The petition for a writ of certiorari was filed June 19, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII

of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether *Athanasaw* v. *United States*, 227 U. S. 326, which holds that the Mann Act applies to the interstate transportation of a woman or girl for the purpose of placing her in surroundings that tend "to induce her to give herself up to a condition of debauchery which eventually and naturally would lead to a course of immorality sexually," should be overruled.

2. Whether there is sufficient evidence to support the jury's finding that petitioner was a party to the conspiracy charged in the indictment.

3. Whether the trial court erred in failing to give instructions requested by petitioner.

4. Whether the record shows any misconduct on the part of government counsel that constitutes reversible error.

STATUTES INVOLVED

The Act of June 25, 1910, c. 395, Sec. 2, 36 Stat. 825 (18 U. S. C. 398), known as the Mann Act, provides:

> Any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, or in any Territory or in the District of Columbia, any woman or girl for the purpose of prostitution or debauchery, or for

any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or who shall knowingly procure or obtain, or cause to be procured or obtained, or aid or assist in procuring or obtaining, any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in any Territory or the District of Columbia, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in any Territory or the District of Columbia, shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $5,000, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the court.

Section 37 of the Criminal Code (18 U. S. C. 88) provides:

> If two or more persons conspire * * * to commit any offense against the United States * * * and one or more of such

parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

STATEMENT

On June 15, 1940, petitioner, Al Youst, Evelyn Clark Youst, and Carroll King were indicted, in the District Court of the United States for the Southern District of Florida, for conspiracy to violate the Mann Act. Petitioner secured a severance, Al Youst and Evelyn Clark Youst were tried and convicted, and there was a mistrial as to King, who was taken ill during the trial.[1]

On July 31, 1941, petitioner was separately reindicted for the same conspiracy (R. 1–4). The indictment charged him with having conspired with Al Youst, Evelyn Clark Youst, Rachel Clark, and Carroll King, to bring about the transportation of seven named women and girls,[2] and other women and girls whose names were to the grand jurors unknown,[3] from Chattanooga, Tennessee,

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[1] Neither the original indictment nor any of the proceedings thereunder are included in the record here. See in support of the statements in the text, R. 207, 233, 235, 298, 341, 643, 659–660.

[2] Mary and Frances McCullar, Billie Johnson, Ann Bennett, Jessie Asher, Betty Martin Tinker, and Frances Jobe (R. 2).

[3] The Government's bill of particulars (R. 15–22) identified Rachel Clark (R. 19, 22) as the only one of the women and girls (R. 2) previously unnamed who was known to have been transported in furtherance of the conspiracy.

Atlanta, Georgia, and other places, to Dade County, Florida, to work for Palm Lake Development, Inc., a corporation owning and operating the La Paloma Club, amid surroundings and conditions tending to induce and influence them "to give themselves up to a condition, form and type of debauchery that would naturally lead them to a course of sexual immorality" (R. 1–2). Ten overt acts were alleged.

Petitioner's first trial, in October 1941, ended in a mistrial (see R. 157, 463, 659–660). On a second trial he was found guilty by a jury (R. 22–23, 692) and was sentenced to two years' imprisonment and to pay a fine of $1,000 (R. 24). Upon appeal to the Circuit Court of Appeals for the Fifth Circuit the conviction was affirmed (R. 711–719).

Petitioner does not challenge the sufficiency of the evidence which establishes the conspiracy alleged in the indictment, and admits (Pet. 7) that, pursuant to the conspiracy, women and girls were brought from other states to the La Paloma Club where they were placed in conditions and surroundings of debauchery of the kind that would lead naturally and inevitably to sexual immorality.[4] He denies only the sufficiency of the evidence

[4] Throughout the time that the club was in operation, except when the "heat" was on, the entertainment was lewd, lascivious, suggestive, and depraved (R. 90–92, 94, 98–99, 135, 168–169, 173, 186–187, 188, 195, 204, 206, 208–209, 231, 306, 371, 389, 418–421, 429). Except when the "heat" was on, petitioner both witnessed and encouraged performances of such

to show that he was a party to or had knowledge of such conspiracy or any acts done in furtherance thereof (Pet. 16, 20, 25–26, 41, 45–46). We shall therefore summarize only that portion of the evidence upon which we rely to show petitioner's participation in the conspiracy:

Petitioner was born in 1890 and has practiced law at Miami, Florida, since 1914 (R. 529, 595–598). Most of his practice has been in the field of criminal law, both as the county solicitor of Dade County, Florida (where the La Paloma Club was located), and as defense counsel (R. 533, 596–598). Prior to December 31, 1938, Al Youst operated the La Paloma Club at 24th Avenue and 79th Street in Miami (R. 87, 526). The club had been raided by the Ku Klux Klan in the fall of 1937 (R. 34, 37, 88, 110, 601–602), and petitioner was asked

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a character (R. 95, 122, 195, 285, 317–318, 432, 548). Several of the girls who were induced to come from other states testified to having never previously seen or participated in performances of the type put on at the La Paloma Club (R. 306, 371–372, 384, 412, 429–430). Most of the girls used as entertainers and dancers were under age (R. 91, 102, 136, 140, 166, 170, 172, 183, 208, 304, 369, 383, 410). Sexual relations at the club were free and easy (R. 93–95, 108–109, 135–136, 307, 403, 408). The main topic of conversation among the employees was sex (R. 99, 125, 169). There was testimony that petitioner frequently talked sex and forms of sex perversion with the girls (R. 95, 96, 98, 115–118, 125), and that he engaged in an unnatural form of sexual intercourse with one of them (R. 134–135, 142, 153, 162, 167, 174) and made advances to another (R. 318, 326–327, 333–339); and that Youst made advances to several others (R. 372–373, 381, 390–391, 431, 443).

and paid by Youst to take the "heat" off the club by taking care of the local "stiffs" (R. 34, 36). Shortly thereafter, in November or December, 1937, the club was raided by officers from the County Solicitor's Office of Dade County, Florida (R. 37, 38, 110), and Youst and his entertainers were placed in jail (R. 602). Petitioner secured their release from jail (R. 529–530, 603, 606–607), and instructed the witness Harkette to impress upon the employees of the club, who were called to testify at a hearing before the County Solicitor, "that they never saw any strip tease dances and never saw any girl expose her body at any time and nothing obscene" (R. 38). As a result of their testimony at this hearing Youst and King were subsequently charged with perjury and defended by petitioner (R. 516–519, 531–532, 606). As a further outgrowth of the investigation by the County Solicitor both an injunction proceeding and criminal informations were filed against Youst, charging him with maintenance of a public nuisance on the basis of the lewd and lascivious character of the entertainment at the La Paloma Club. In these proceedings Youst was represented by petitioner, on whose advice Youst allowed an injunction decree to be entered by consent and pleaded *nolo contendere* to the criminal information (R. 525–528, 554–558). Petitioner also represented Youst or the club in a number of other legal proceedings (R. 514–528, 560–561).

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Because of having been convicted of burglary Youst was unable to secure a liquor license (R. 601, 610). In the latter part of 1938 he purchased, in the name of his sister, Mrs. MacNichol, a five-acre tract at 27th Avenue and 79th Street, three blocks away from the old location (R. 88, 534, 536). Construction of a new clubhouse and a number of cottages was completed under the supervision of Bert Reeves (R. 52). Petitioner was frequently present while the work was in progress (R. 56–57, 210). At the solicitation of petitioner, and with $1,500 secured at petitioner's office, Holmes Allen applied for and received a liquor license in the name of the "Palm Club," which petitioner represented to Allen was to be run by a partnership consisting of petitioner, Reeves, and Allen (R. 67–68, 71). Thereafter, early in 1939, Palm Lake Development, Inc., was organized with petitioner, Reeves, and Allen as the original incorporators. Reeves was president, Allen vice president, and petitioner secretary-treasurer. Of the 20 shares issued, 10 were issued to Youst's sister, Mrs. MacNichol, 7 to her husband, 2 to petitioner, and 1 to Reeves which he never received and subsequently indorsed over to aid the corporation in securing a loan. The property on which the buildings had been erected was transferred by Mrs. MacNichol and her husband to the corporation. (R. 52–58, 61–64, 66, 71–74, 537, 539–541, 575, 611–612.) Subsequently, in September 1939,

by falsely representing that Youst had nothing to do with the management of the club but was merely to be manager of the floor show, petitioner secured a transfer to the corporation of the liquor license that Allen previously had procured in the name of the "Palm Club" (R. 48–51, 52–54, 57, 59–60, 69, 72, 75–79, 80–82, 84–87, 546–547). After discovering that the entertainers from the old club had made their appearance at the new club (R. 68, 88, 96–97, 239, 547–548), Allen resigned as president out of "self-respect" (R. 68, 70, 72–73). Reeves then became president and Frank Talley, orchestra leader at the club, became vice president (R. 538–539).

The minute-book of the corporation was kept at all times in petitioner's law office (R. 470, 486, 609). Checks issued by the corporation required the signatures both of petitioner as secretary-treasurer and of Youst as general manager (R. 58–59, 471, 476, 487, 609–610). Petitioner referred to himself, was referred to by others, and was responsible for his being so referred to by others, as the "owner" and "boss" of the club (R. 112–114, 169, 174, 176, 179, 212, 248, 253, 257, 277, 286–287, 293, 321, 351, 415, 423, 434, 578, 620, 636–637).[5] When the "heat" was on the

[5] The government witness, Evelyn Clark Youst, testified: "He [petitioner] would tell me to call all the girls at the bar and introduce him as the boss and he was the owner of the La Paloma Club and my husband was just a manager there * * * Almost every time he would be out there he

club, but only then, he would instruct the girls not to put on the type of performances that had drawn the "heat" (R. 212, 231–232, 247, 253, 415–416, 420–421). He referred to himself before them, and was regarded by them, as the "boss" (R. 112–114, 174, 212, 248, 253, 257, 277, 286–287, 293, 321, 351, 415, 423, 434). He was frequently at the club (R. 37–39, 56–57, 88, 89, 134, 171, 187, 209, 210, 301, 317, 391, 415, 431, 445, 544, 545, 548). On his visits to the club he would go behind the bar, "look in the cash register or punch some of the waiter's pads," engage in conversation with Youst as to the management, go over the books with Youst, and receive money from Youst (R. 210–212, 213, 247–248, 250–253, 393, 432–433).

Petitioner himself testified that he knew as early as the spring or summer of 1939 that some of the girls had come from New Orleans (R. 636). One of the girls whom Youst had brought from New Orleans in the fall of 1938, testified that after her arrival at the club petitioner had introduced himself to her saying "You are one of the crew Al brought up here?" (R. 184–185, 189, 192–195).

There was further evidence that petitioner knew that other girls had been transported from other states. In March 1939, Evelyn Clark Youst, a co-conspirator who had begun working at the La

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would say 'I am the owner of the club,' to bring in the new girls and to introduce them as he was the boss" (R. 212).

Paloma Club in November 1938 (R. 208, 238) and became the mistress and later the wife of Youst (R. 210–211, 215, 236, 243), made a trip to her home at Chattanooga, at Youst's request, to get girls to work at the La Paloma Club.[6] She traveled at the club's expense. She got in touch with Betty Martin Tinker in Chattanooga, who came to Miami around Easter, 1939, on money wired her by the club (R. 217–219, 274–277, 369–371, 375–377). Mrs. Tinker testified that upon being introduced to her, petitioner said "So you are from Chattanooga too" (R. 374).

Again, in June 1939, Rachel Clark, Evelyn's sister, who had come from Chattanooga to Miami the preceding January at Evelyn's request (R. 214), returned to Chattanooga. Before she left petitioner told her "if you find any girls as cute as you are, bring them down" (R. 320, 329–331, 333, 366–367, 562, 581, 638). Carroll King, a co-conspirator and bartender at the club, accompanied Rachel as far as Atlanta, and it was common gossip at the club that they were going to bring back "some cute ones" (R. 219–220, 264–265, 307–309). At Chattanooga Rachel put an advertisement in the Chattanooga Times for June 28, 1939 (R. 309–310). The McCullar sisters and Billie Johnson answered this advertisement (R.

[6] She testified: "We were always looking for new girls, new talent all the time. Every time I would go on a vacation my husband would always tell me to bring back some new girls" (R. 213, 216, 257).

310–311, 384–386, 412). At Atlanta, King secured Ann Bennett and Jessie Asher (R. 504–505, 508). King then drove to Chattanooga, brought the McCullar sisters and Billie Johnson to Atlanta, there picked up Jessie Asher and Ann Bennett and returned with the five to Miami about June 30 or July 1, paying for gasoline and their meals *en route,* with money advanced to him by Mrs. Irene Clark, the mother of Evelyn and Rachel (R. 221, 225–226, 385–388, 396, 413, 505, 509). Mrs. Clark was reimbursed by a check from the Palm Lake Development, Inc., signed by both Youst and petitioner (R. 223–225, 266–269, 311). Shortly after the arrival of these five girls at the club Evelyn introduced petitioner to them as their "boss," pursuant to his expressed desire "to meet the babes from Tennessee" (R. 226, 423). Upon being introduced to them petitioner said "you are the babes that Carroll King brought down from Tennessee?" (R. 391, 392, 405, 415).

Rachel Clark returned to Miami at Evelyn's request on money supplied by their mother, who was reimbursed by a check from the Palm Lake Development, Inc., signed by both Youst and petitioner (R. 226–228, 263, 270–274, 312–313). Evelyn testified that there was some delay in securing petitioner's signature on the check, and that contrary to the usual practice of his signing checks in advance, before they were made out, he did not sign this one until after the payee's name had

been inserted and Youst had signed it (R. 228, 271–273). She also testified that while Rachel was away petitioner said to Youst in her presence that since Youst had Evelyn, "when Rachel would come back he [petitioner] was going to have Rachel" (R. 229, 262, 280). Rachel testified to a previous request from petitioner that he be permitted to have unnatural relations with her (R. 318, 326–327, 333–339).

While denying knowledge of Youst's activities in procuring girls, petitioner admitted on cross-examination that had he been told how Youst was getting them it would have made no difference—it would have been "all right" with him (R. 631). He did not deny having been consulted by Carroll King, at the request of Youst, as to whether the newspaper advertisements for dancers and entertainers might get them "into trouble with the white slave law" (R. 631–632). Petitioner actively aided Youst in keeping at the club girls under age who were being investigated by the probation authorities. Thus, in August 1939, Youst brought Vicki Van Payne, Ileen Randall, and Patricia O'Hara to petitioner's office, for the purpose of having him straighten out the difficulties and enable them to continue working at the club. Petitioner told them that thenceforth he would be their legal guardian (R. 132–134, 142, 165–166, 171–173). Although being told that Patricia O'Hara was eighteen (R. 172), petitioner wrote

out a telegram stating that she was born October 27, 1917, which was forwarded by mail to her grandmother who, at the girl's request, sent petitioner the telegram he himself had composed (R. 172–173, 572–573). He turned it over to the juvenile authorities (R. 634).

Following the raid by the Federal Bureau of Investigation on March 26, 1940, Evelyn Clarke Youst and Rachel Clark made statements to officers of the Bureau implicating petitioner and Youst. Petitioner urged them to retract these statements when called to testify at the preliminary hearing before the United States Commissioner, and to say that they were told to make them by the officers. Since it was "big men like Al and Fred" that the F. B. I. were after and "they would not put kids like us in jail," the girls should testify in such a way as to throw the whole responsibility on Evelyn. In that way everyone would "beat the rap," and they would then put up a big sign saying: "We beat the Ku Klux Klan, county and state, and beat the sheriff's office and now we beat the Federal Government. This is Youst's and Pine's notorious night club. We are going to show you everything" (R. 233–237, 294–297, 323–324, 359, 363). The Government's witness Laura Baker testified that after the F. B. I. raid both Youst and petitioner had requested that she say nothing to the authorities (R. 101–102, 121–122) about her having spent a

night at a local hotel, at the request of Youst, with a man whose aid in securing a liquor license Youst desired to obtain (R. 94).

ARGUMENT

I

Petitioner asks (Pet. 18, 23–24, 33–39) this Court to overrule *Athanasaw* v. *United States*, 227 U. S. 326, which holds that the Mann Act applies to the interstate transportation of a woman or girl for the purpose of placing her in surroundings that tend "to induce her to give herself up to a condition of debauchery which eventually and naturally would lead to a course of immorality sexually." He contends that this interpretation deprives the statute of an ascertainable standard of guilt and constitutes an unwarranted extension of its compass.

The *Athanasaw* case was decided in 1913, less than three years after the statute's enactment, by a unanimous court. It has been followed by the lower federal courts.[7] By allowing the statute to remain unamended, Congress has acquiesced in this long-standing judicial construction of it.[8]

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[7] *United States* v. *Lewis*, 110 F. (2d) 460 (C. C. A. 7), certiorari denied, 310 U. S. 634; *Beyer* v. *United States*, 251 Fed. 39 (C. C. A. 9); *Burgess* v. *United States*, 294 Fed. 1002 (App. D. C.); *United States* v. *Brand*, 229 Fed. 847 (S. D. N. Y.); *United States* v. *Long*, 16 F. Supp. 231 (E. D. Ill.).

[8] Cf. *United States* v. *Elgin, J. & E. Ry. Co.*, 298 U. S. 492, 500; *Beale* v. *United States*, 71 F. (2d) 737, 739 (C. C. A. 8).

We submit that the *Athanasaw* decision is an application of the plain meaning of the statute rather than a judicial enlargement of it, and that neither as written nor as thus applied does the statute violate the "void for vagueness" rule upon which petitioner relies. While the words of the statute, "debauchery," "any other immoral purpose," and "any other immoral practice," apart from their context, might be given an extremely wide application, they are restricted contextually to debauchery and immoral purposes or practices of a sexual character.[9] But as was ruled in the *Athanasaw* case, the statutory language does not require that the immediate objective be sexual intercourse. It is clearly sufficient if the surroundings to which the girl is taken are such as to conduce naturally to sexual immorality. Such a construction of the statute can do no violence to the common understanding of the words "debauchery" or "immorality" when confined as they are to sexual looseness.[10] Petitioner does not con-

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[9] *United States* v. *Lewis*, 110 F. (2d) 460, 462 (C. C. A. 7), certiorari denied 310 U. S. 634; *Suslak* v. *United States*, 213 Fed. 913, 917 (C. C. A. 9); *King* v. *United States*, 55 F. (2d) 1058, 1061 (C. C. A. 10); *Burgess* v. *United States*, 294 Fed. 1002, 1004 (App. D. C.).

[10] Construed in the light of common understanding of the terms used, the statute and the language of this Court in the *Athanasaw* case are no less precise and definite as a guide to conduct than are the various federal and state obscenity statutes. See *Dunlop* v. *United States*, 165 U. S. 486, 500–501; *Clark* v. *United States*, 211 Fed. 916, 918 (C. C. A. 8); *Moens* v. *United States*, 267 Fed. 317 (App. D. C.); *Commonwealth*

tend—and in view of the evidence he obviously could not successfully contend—that the La Paloma Club was not within common understanding "an efficient school of debauchery of the special immorality"[11] that the statute was designed to cover. Consequently, the interstate transportation of a woman or girl into such surroundings, for the purpose of having her participate in or be present at the sexual exhibitions and acrobatics performed there, can be deemed nothing less than transportation for an "immoral purpose" or the purpose of "debauchery," giving those terms of the statute their common understanding. To say the contrary "would shock the common understanding of what constitutes an immoral purpose." *Caminetti* v. *United States*, 242 U. S. 470, 486.

Accordingly, there is even less basis for asking this Court to reconsider the *Athanasaw* decision than there was for the request, rejected at the last Term,[12] that it reconsider and overrule its decision in *Caminetti* v. *United States*, 242 U. S. 470, which held the Mann Act applicable to noncommercialized vice. The two decisions are parts of

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v. *New*, 142 Pa. Super. 358, 16 A. (2d) 437 (1940); *People* v. *Wendling*, 258 N. Y. 451 (1932); *People* v. *Pesky*, 230 App. Div. 200 (1930), affirmed, 254 N. Y. 373 (1930). Cf. *Mutual Film Corporation* v. *Industrial Commission of Ohio*, 236 U. S. 230, 245–246. Cf. *United States* v. *Bitty*, 208 U. S. 393, 402.

[11] *Athanasaw* v. *United States*, 227 U. S., at 333.

[12] *Reginelli* v. *United States*, No. 767, October Term, 1942, certiorari denied, April 5, 1943.

a single pattern of interpretation accepted in the early years of the statute's enforcement and consistently applied since.[13]

II

In rejecting petitioner's contention that the evidence does not support the verdict, the circuit court of appeals, while stating that the evidence made it clear that petitioner "knew both generally and particularly what was going on at the club" (R. 717), held that it was not necessary for the Government to prove that petitioner "had knowledge of the purpose to bring or the actual bringing in of a particular girl"; that "It was sufficient to show that he knew of, and was a party to, a general plan or conspiracy to transport girls or women unlawfully in interstate commerce" (R. 718). But petitioner, while denying that the evidence showed any such general conspiracy, asserts that by the indictment (R. 2) and bill of particulars (R. 22) he was placed on trial for conspiring to transport certain specific individuals, and that the circuit court of appeals was therefore in error in sustaining his conviction on the basis

[13] If, as we submit, the statute means what this Court said it meant in the *Athanasaw* case, it cannot matter that the draftsmen of the indictment in the case at bar utilized the language of that decision rather than the terminology of the statute, as petitioner points out (Pet. 38), An indictment need not follow the statutory language; it is sufficient if it alleges the elements of the offense. See *Moens* v. *United States*, 267 Fed. 317, 320–322 (App. D. C.); *United States* v. *Altman*, 8 F. Supp. 880, 884 (W. D. N. Y.).

of a more general conspiracy (Pet. 7–11, 16, 20, 25–26, 41, 45–46).

It is unnecessary, we believe, to determine whether the conspiracy charged was as narrow in scope as petitioner insists, since the evidence, we submit, was sufficient to make petitioner a party either to a general conspiracy to transport girls as needed, or to a narrower one to transport specific individuals. Under settled principles of the law of conspiracy, petitioner may be tied into a conspiracy of the latter type even though he may never have heard of any particular girl or been aware of the specific circumstances of her transportation; and, of course, it was not necessary to show that all of the girls named were transported pursuant to the conspiracy, or indeed for that matter that any of them were so transported, since it is not necessary to establish that a substantive offense was committed.

Petitioner's position that the evidence does not support the verdict is apparently predicated to a large extent upon the erroneous assumption that there must be "direct or positive testimony or proof" (Pet. 4) of his guilty connection with the conspiracy charged. But it is settled that no formal agreement is essential to the formation of a conspiracy [14] and that the existence of an agreement

[14] "Not the form or manner in which the understanding is made, but the fact of its existence and the further one of making it effective by overt conduct are the crucial matters." *Direct Sales Co., Inc.* v. *United States*, No. 593, October Term, 1942, decided June 14, 1943. The existence of an

may be shown by inference from acts, conduct, and attendant circumstances.[15] A conspiracy is often susceptible of proof in no other way than by a collocation of circumstances tending to sustain the inferences necessary to support the verdict,[16] and one who knowingly cooperates to further the objects of a conspiracy thereby becomes a party to it.[17] It is not essential that he under-

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agreement is sufficiently shown by concert of action, "all the parties working together understandingly, with a single design for the accomplishment of a common purpose." *Fowler* v. *United States*, 273 Fed. 15, 19 (C. C. A. 9); *Marino* v. *United States*, 91 F. (2d) 691, 694 (C. C. A. 9), certiorari denied *sub nom. Gullo* v. *United States*, 302 U. S. 764; *Marx* v. *United States*, 86 F. (2d) 245, 250 (C. C. A. 8); *Stack* v. *United States*, 27 F. (2d) 16, 17 (C. C. A. 9). It is sufficient if there is a mutual implied understanding, and cooperation in furthering the purposes of the unlawful enterprise. *Martin* v. *United States*, 100 F. (2d) 490, 495–496 (C. C. A. 10), certiorari denied, 306 U. S. 649; *Booth* v. *United States*, 57 F. (2d) 192, 197 (C. C. A. 10); *Jezewski* v. *United States*, 13 F. (2d) 599, 602 (C. C. A. 6), certiorari denied, 273 U. S. 735; *Allen* v. *United States*, 4 F. (2d) 688, 691 (C. C. A. 7), certiorari denied *sub nom. Mullen* v. *United States*, 267 U. S. 598.

[15] *Goode* v. *United States*, 58 F. (2d) 105, 107 (C. C. A. 8); *Telman* v. *United States*, 67 F. (2d) 716, 717 (C. C. A. 10), certiorari denied, 292 U. S. 650; *Glasser* v. *United States*, 315 U. S. 60, 80; *United States* v. *Harrison*, 121 F. (2d) 930, 934 (C. C. A. 3), certiorari denied, 314 U. S. 661.

[16] *United States* v. *Manton*, 107 F. (2d) 834, 839 (C. C. A. 2), certiorari denied, 309 U. S. 664; *Direct Sales Co., Inc.* v. *United States*, No. 593, October Term, 1942, decided June 14, 1943.

[17] *Allen* v. *United States*, 4 F. (2d) 688, 698 (C. C. A. 7), certiorari denied *sub nom. Mullen* v. *United States*, 267 U. S. 598; *Booth* v. *United States*, 57 F. (2d) 192, 197 (C. C. A. 10); *Martin* v. *United States*, 100 F. (2d) 490, 496 (C. C. A. 10), certiorari denied, 306 U. S. 649.

stand the entire scope of the conspiracy. It is sufficient if he knows its purposes in a general way and participates in their furtherance.[18] More specifically, in prosecutions for conspiracy to violate the Mann Act "the jury may infer intent from all the circumstances in evidence," and evidence of the conduct of a party after the transportation has been completed may be sufficient to sustain his conviction.[19] And of course the evidence, with the inferences reasonably to be derived therefrom, must be viewed in the light most favorable to the Government. *Glasser* v. *United States,* 315 U. S. 60, 80.

The evidence set forth in the Statement, *supra,* clearly shows that as early as November or December, 1937, the nature of petitioner's contacts with Youst and the La Paloma Club was sufficient to put him on notice as to the kind of a place it was, and that the transportation to it from out-of-state of any women or girls to serve as entertainers would constitute a violation of the Mann Act. Petitioner was further warned by the nature of

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[18] *McDonnell* v. *United States*, 19 F. (2d) 801, 803 (C.C. A. 1), certiorari denied, 275 U. S. 551; *Galatas* v. *United States*, 80 F. (2d) 15, 23 (C. C. A. 8), certiorari denied, 297 U. S. 711; *Craig* v. *United States*, 81 F. (2d) 816, 822 (C. C. A. 9), certiorari denied, 298 U. S. 690; *Martin* v. *United States*, 100 F. (2d) 490, 495–496 (C. C. A. 10), certiorari denied, 306 U. S. 649.

[19] *Shama* v. *United States*, 94 F. (2d) 1, 4 (C. C. A. 8), certiorari denied, 304 U. S. 568; *Kelly* v. *United States*, 297 Fed. 212 (C. C. A. 9).

the state court proceedings filed against Youst in November 1938, and in which he was represented by petitioner (R. 525–528, 554–558). Despite this knowledge petitioner entered upon a business association with Youst in the operation of the La Paloma Club. To enable the club to have the liquor license necessary to its life, he admits (Pet. 6–7) that he deliberately misrepresented to the County Commissioners the relation of Youst to the club. He became an incorporator, shareholder, and secretary-treasurer of the corporation owning and operating the club, under an arrangement permitting no checks to be issued unless signed by him as well as Youst. Although serving as a "front" for Youst, he was no mere "dummy" as he now contends (Pet. 5) he was. He referred to himself, and was responsible for his being referred to by others, as "owner" and "boss" of the club. By his own testimony (R. 548) as well as by that of others (R. 95, 188, 195, 285, 317–318, 432), he witnessed and encouraged the sexual exhibitions performed as part of the regular entertainment, and was the one who would instruct the girls when the "heat" was on, but only then, to call a halt (R. 212, 231–232, 247, 253, 415–416, 420–421). By his own testimony he callously disavowed any interest in how the entertainers were procured (R. 631), despite the fact of its being common knowledge at the club, where he was frequently present on business, that they

were regularly being brought from other states, and despite the fact of his having signed checks that paid for their transportation. Knowing, according to his own testimony, by the spring or summer of 1939 that Youst had brought some entertainers from New Orleans (R. 636), he introduced himself to one of them (Flora May Richardson) saying "You are one of the crew Al brought up here?" (R. 189, 192–195). To Evelyn Youst he expressed a desire to meet "the babes from Tennessee" and was introduced to them as their "boss" (R. 226, 423), saying to them "You are the babes that Carroll King brought down from Tennessee?" (R. 391, 392, 405, 415). While Rachel Clark, to whom he had made advances (R. 318, 326–327, 333–339), was in Tennessee, he told Youst that as Youst had Evelyn Clark "when Rachel would come back he [petitioner] was going to have Rachel" (R. 229, 262, 280). He actively aided Youst to the point of deliberate deception of the age of girls whom the juvenile authorities were investigating (R. 132–134, 142, 165–166, 171–173). After the raid by the Federal Bureau of Investigation, and before anyone had been indicted, he showed full realization of the extent to which he himself as well as Youst had become incriminated (R. 233–237, 294–297, 323–324, 359, 363).

In sum, the conclusion cannot be avoided that, although petitioner left the details of the manage-

ment of the club to Youst and was not interested in the identity of the particular girls to be procured, he, nevertheless, was generally aware of all that was going on, had a mutual understanding and common purpose with Youst, and actively aided and abetted the consummation of that purpose. The collocation of circumstances sustaining this conclusion is far too strong for him now to assert convincingly complete lack of knowledge or guilty connection with the unlawful purposes and acts of his coconspirators whose "front" he deliberately chose to be. When a conspiracy is established, as it was here, only slight quantitative evidence connecting a particular defendant with it may in the circumstances be substantial and, therefore, sufficient to warrant submission to the jury of the issue of his guilt.[20] Here the evidence was abundant.[21]

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[20] *Meyers* v. *United States*, 94 F. (2d) 433, 434 (C. C. A. 6), certiorari denied, 304 U. S. 583; *Marx* v. *United States*, 86 F. (2d) 245, 250 (C. C. A. 8); *Galatas* v. *United States*, 80 F. (2d) 15, 24 (C. C. A. 8), certiorari denied, 297 U. S. 711.

[21] Here, as in *Direct Sales, Inc.* v. *United States*, No. 593, October Term, 1942, decided June 14, 1943, "There is more than suspicion, more than knowledge, acquiescence, carelessness, indifference, lack of concern. There is informed and interested cooperation, stimulation, instigation. And there is also a 'stake in the venture' which, even if it may not be essential, is not irrelevant to the question of conspiracy. * * * In such a posture the case does not fall doubtfully outside either the shadowy border between lawful cooperation and criminal association or the no less elusive line which separates

III

Petitioner urges as reversible error (Pet. 11–14, 26–28, 32, 46–54) the trial court's refusal to give to the jury petitioner's requested instructions 6, 10, 24, and 29 (R. 679–680, 682, 687–688, 691–692).

Requested instruction No. 6 (Pet. 11; R. 679), to the effect that accomplice testimony "should be received with extreme caution," failed to identify by name Evelyn Youst and Rachel Clark as the only Government witnesses who could possibly have been deemed accomplices of petitioner. The other girls named in the indictment were in no sense accomplices but victims.[22] The requested instruction was therefore, as the circuit court of appeals held, "couched in such general terms as to be misleading" (R. 713).

Furthermore, even as applied solely to accomplice testimony, the giving of an instruction of this nature rests, as the court below held (R. 713–714), in the discretion of the trial court.[23] It is

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conspiracy from overlapping forms of criminal cooperation."

The judge emphasized throughout his charge that in order to convict petitioner the jury must know that he had knowledge of the purpose of the conspiracy and that he intentionally participated in it (R. 663–671).

[22] *Gebardi* v. *United States*, 287 U. S. 112, 118; *Miller* v. *United States*, 95 F. (2d) 492, 494 (C. C. A. 9); cf. *United States* v. *Holte*, 236 U. S. 140; *Mackreth* v. *United States*, 103 F. (2d) 495, 496 (C. C. A. 5).

[23] *United States* v. *Block*, 88 F. (2d) 618, 621 (C. C. A. 2): "It is common practice so to caution a jury, but it is not necessary even when as here the accused asks that it be done"; *United States* v. *Becker*, 62 F. (2d) 1007, 1009 (C. C. A. 2):

"well established" that a conviction under the Mann Act, as under other statutes, "may rest on the evidence alone of a coconspirator or accomplice." *Heitler* v. *United States,* 244 Fed. 140, 144 (C. C. A. 7); *Diggs* v. *United States,* 220 Fed. 545, 552–553 (C. C. A. 9), affirmed *sub nom. Caminetti* v. *United States,* 242 U. S. 470, 495. That the trial court did not abuse its discretion here is plain. The testimony of Evelyn Youst and Rachel Clark was abundantly corroborated by other witnesses who were not accomplices. In this respect the case is materially different from *Freed* v. *United States,* 266 Fed. 1012 (App. D. C.), relied on by petitioner (Pet. 20, 47), where the reversal was for failure to advise the jury "as to the danger of convicting upon the *uncorroborated* testimony of accomplices." 266 Fed. at 1016. (Italics supplied.)

Requested instruction No. 10 (Pet. 12; R. 682) was to the effect that if the jury should find that petitioner had no knowledge of the transportation

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"The warning is never an absolute necessity. It is usually desirable to give it; in close cases it may turn the scale; but it is at most merely a part of the general conduct of the trial, over which the judge's powers are discretionary, like his control over cross-examination, or his comments on the evidence"; *Rachmil* v. *United States*, 288 Fed. 782, 785 (C. C. A. 2); *Hanley* v. *United States*, 123 Fed. 849 (C. C. A. 2); *Hanks* v. *United States*, 97 F. (2d) 309, 311–312 (C. C. A. 4); *Wainer* v. *United States*, 82 F. (2d) 305, 307–308 (C. C. A. 7); *Wallace* v. *United States*, 243 Fed. 300, 307 (C. C. A. 7); *Hays* v. *United States*, 231 Fed. 106, 110 (C. C. A. 8), affirmed *sub nom. Caminetti* v. *United States*, 242 U. S. 470, 495; *Cheatham* v. *State*, 67 Miss. 335 (1890); *State* v. *Haney*, 19 N. C. 390, 398 (1837).

of any of the named women or girls, or no intent that any of such women or girls would be transported, it must acquit him. This instruction was properly refused. In so far at least as it required knowledge by petitioner of the identity of the girls transported, it introduced an element which, of course, it was not necessary for the Government to establish as a prerequisite to petitioner's conviction upon a charge of conspiracy to transport. Additionally, the trial judge in his charge not only defined the elements of a conspiracy, but correctly delineated the factors which conditioned petitioner's accountability, and over and over again reiterated the essentials of which the jury would have to have a "full, firm, and abiding conviction" in order to hold petitioner guilty (R. 662–673).

Requested instruction No. 24 (Pet. 12–13; R. 687–688) related to the use of circumstantial evidence. A comparison of the requested charge with the one actually given on circumstantial evidence [24] demonstrates beyond question that the cir-

[24] "Circumstantial evidence is the proof of independent facts which if proven beyond a reasonable doubt another fact would follow as a natural or very probable conclusion from the facts that have been proven. Guilt established by circumstantial evidence is an inference of guilt from other facts independently proven. Proof by circumstantial evidence is the proof of one fact by proof of the existence of certain other facts. Guilt, if proven by circumstantial evidence, must to the satisfaction of the jury be reasonabl[y], natural[ly] and probably inferred beyond a reasonable doubt from the circumstances of other facts proven and such inference of guilt

cuit court of appeals was correct in holding that the one given embodied all the essentials of the one requested (R. 715).

Requested instruction No. 29 (Pet. 13–14; R. 691–692) would have told the jury that "the maturity or immaturity and the experience or inexperience" of the women or girls brought to the La Paloma Club were "material facts" for its consideration in determining the question, submitted to it (R. 671–672), as to whether the conditions there were such as would tend to induce them to give themselves up to a condition of debauchery eventually and naturally leading to a course of immorality sexually. As the circuit court of appeals held (R. 715), the Mann Act is not an anti-seduction statute, and the requested instruction was, under the circumstances of this case at least, "a wholly incorrect statement of the law." [25]

The language in *United States* v. *Lewis,* 110 F. (2d) 460, 464 (C. C. A. 7), certiorari denied, 310 U. S. 634, upon which petitioner relies (Pet. 22, 52), did not relate to an instruction given or refused and was used in a case in which the defendants contended that "their exhibitions were intended to be educational and to show the disas-

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must be consistent only with guilt and inconsistent with innocence. These independent facts or circumstantial evidence must be proven beyond a reasonable doubt as independent facts and leading to such conclusion under the rules as I have stated." (R. 672–673.)

[25] *Suslak* v. *United States,* 213 Fed. 913 (C. C. A. 9); *Van Pelt* v. *United States,* 240 Fed. 346, 348 (C. C. A. 4).

trous effects of immoral conduct." However significant may be the maturity or immaturity of a participant in an exhibition of such a character, there is no basis for the application of any such criterion in a case such as this, where education in debauchery, of both participants and spectators, could have been the sole purpose.

IV

Under a heading phrased in large part in the language of this Court's opinion in *Berger* v. *United States,* 295 U. S. 78, 84–85, petitioner makes sweeping charges of misconduct on the part of the prosecuting attorneys, alleged to constitute reversible error although no exception was taken at the trial and no assignment of error was predicated thereon (Pet. 14, 22–23, 28–29, 32, 54–56). Without discussing any specific instances, he in effect asks this Court to search the entire record in the hope of its finding evidence of such misconduct. Space limitations obviously preclude the Government from undertaking any detailed refutation of petitioner's sweeping charges. It suffices to say that the pages of the record cited by petitioner (Pet. 56) carry their own refutation of the existence of any misconduct even remotely resembling that which occurred in the *Berger* case.

On the basis of a "most careful reading of the record" the circuit court of appeals had "no doubt that the conduct of the prosecution did not

constitute reversible error" and was in fact "remarkably free" from anything in the nature of prejudicial misconduct or unfairness on the part of the prosecution, despite a vigorous personal defense by one who was himself an experienced criminal lawyer (R. 713–714).

CONCLUSION

No adequate reason is presented for asking this Court to reconsider its decision in the *Athanasaw* case. Petitioner had a fair trial and his conviction is adequately supported by the evidence. No question is presented which warrants review on certiorari. It is, therefore, respectfully submitted that the petition should be denied.

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IN THE SUPREME COURT OF THE UNITED STATES

October 1943 Term

No. 111

FRED PINE (the appellant below),

Petitioner,

vs.

UNITED STATES OF AMERICA (the appellee below),

Respondent.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

PREFACE

This reply brief is in two parts. The first part is an amplification of the argument in our original brief of the questions numbered II and III. The second part is an amplification of the argument of the question numbered IV.

I

We pointed out in the petition and in our supporting brief that the petitioner was specifically charged with having conspired with others to effect the illegal transportation in interstate commerce of Mary Agnes McCullar, Frances Pauline McCullar, Billie Johnson, Ann Bennett, Jessie Asher, Betty Martin Tinker, Frances Jobe and Rachel Louise Clark (the women and girls named in the indictment and in the Government's bill of particulars).

We showed (at pages 7, 8 and 9 of the petition), by appropriate references to the record, that there was no evidence that the petitioner knew of any plan or purpose to effect the interstate transportation of any of the women or girls whose transportation it was charged he conspired to effect. We stated (at page 15 of the petition) that during the course of the oral argument of the case before the appellate court the United States Attorney admitted that the record reflects no evidence that the petitioner had knowledge of any such plan or purpose. The statement has not been denied or contradicted by counsel for the Government.

The admission of the United States Attorney (which

was virtually a confession of error) forced the appellate court, in order to avoid a reversal of the judgment of conviction, to evolve a theory of its own. The court held that (notwithstanding the specific charge preferred against the petitioner) it was not necessary to prove that he knew of and became a party to a conspiracy to effect the illegal transportation of any of the women or girls whose transportation it was charged he conspired to effect, but that it was proper and sufficient to show that he knew of and became a party to a general, comprehensive and continuing conspiracy to effect the illegal transportation of women or girls whenever they should be needed or wanted (without having in contemplation the transportation of any specific woman or girl).

This new theory, a product of judicial ingenuity, had not been advanced by counsel for the Government in either the trial court or the appellate court. Counsel for the petitioner have never been accorded the opportunity to fully and adequately express their views in opposition to such theory.

The conclusion is inescapable, therefore, that the petitioner was charged with and tried for one offense and has been convicted (on appeal) of another. The grand jurors did not charge, and did not intend to charge, the petitioner with having entered into a general, comprehensive and continuing conspiracy to effect the illegal transportation in interstate commerce of women or girls whenever they should be needed or wanted as employees at the night club in question. He was not informed (by the indictment and the bill of particulars) that he was to be tried for having entered into such a general, comprehensive and continuing conspiracy. He

entered the court room to defend himself against the charge which the grand jurors preferred against him and not to defend himself against the charge originated by the Circuit Court of Appeals.

It is now urged by counsel for the Government (in their brief in opposition to the petition for a writ of certiorari), despite the admission made by the United States Attorney before the appellate court (to which we have adverted), that "it is unnecessary . . . to determine whether the conspiracy charged was as narrow in scope as the petitioner insists, since the evidence . . . was sufficient to make petitioner a party either to a general conspiracy to transport girls as needed, or to a narrower one to transport specific individuals."

It is demonstrably true (as we have shown at pages 7, 8 and 9 of the petition), and the United States Attorney was forced to concede, that the record reflects no evidence which shows that the petitioner had knowledge of any plan or purpose to effect the transportation in interstate commerce of Mary Agnes McCullar, Frances Pauline McCullar, Billie Johnson, Ann Bennett, Jessie Asher, Betty Martin Tinker, Frances Jobe or Rachel Louise Clark (the women and girls whose transportation the petitioner was charged by the grand jurors with having conspired to effect).

Even if the evidence showed (and we emphatically insist that it did not) that the petitioner knew of, and became a party to, "a general conspiracy to transport girls as needed," the failure of the Government to prove the charge on which the petitioner was indicted and tried should have resulted in a directed verdict of acquittal.

Rabens v. United States (C. C. A. 4), 146 Fed. 978; United States v. Wills (C. C. A. 3), 36 Fed. (2d) 855; Lowell v. People (Ill.), 82 N. E. 229.

The contention of counsel for the Government is that, while the grand jurors may have charged the petitioner with having committed a specific offense, the failure of the Government to prove that he committed such offense should not result in his acquittal if the evidence was sufficient to show that he committed another offense with which the grand jurors neglected to charge him. We cannot believe that the contention will prevail.

II

We reiterate the assertion made in our original brief that the evidence was utterly insufficient to show that the petitioner knew of and became a party to a general, comprehensive and continuing conspiracy to effect the illegal transportation in interstate commerce of women and girls whenever they should be needed or wanted (without having in contemplation the transportation of any specific woman or girl).

The Government relied solely on circumstantial evidence. Two of the alleged co-conspirators (Evelyn Clark Youst and Rachel Louise Clark) testified as Government witnesses but were unable to provide any positive testimony that the petitioner knew of any plan or purpose to effect the transportation in interstate commerce of women or girls.

The true test by which to determine the value of

circumstantial evidence, in respect to its sufficiency to warrant a conviction in a criminal case, is not whether the proof establishes circumstances which are consistent or which coincide with the hypothesis or theory of the guilt of the accused, but whether the circumstances, satisfactorily established, are of a conclusive character and point so surely and unerringly to the guilt of the accused as to exclude every reasonable hypothesis or theory of his innocence. The force of circumstantial evidence being exclusive in its character, the mere coincidence of a given number of circumstances with the hypothesis or theory of guilt, or the fact that such circumstances concur with, or render possible, the hypothesis or theory of the guilt of the accused, is not a reliable or admissible test, unless the circumstances arise to such a degree of cogency and force as in the order of natural cause and effect to exclude to a moral certainty every other hypothesis except the single one of guilt.

The proof relied on by the Government in this case does not meet the test. All of the evidence adduced is consistent with the theory that the petitioner had no knowledge of any plan or purpose to effect the illegal transportation in interstate commerce of any women or girls. If he did not know of any such plan or purpose, then, of course, he could not have been a party to it. "Without the knowledge, the intent cannot exist. United States v. Falcone, 311 U. S. 205, 85 L. ed. 128, 61 S. Ct. 204, supra. Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal. Ibid. This, because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning what, in that case, was called a dragnet to draw in all substantive crimes." Direct Sales Company v. United

States (decided June 14, 1943), L. ed. Advance Opinions, Vol. 87, No. 18, p. 1227 (text 1231).

Counsel for the Government summarize at pages 6-15 of their brief the evidence which they contend shows the petitioner's knowledge of and participation in an unlawful conspiracy to violate the Mann Act. The summarization is largely a reiteration of the statement of the evidence found at pages 4-10 of our original brief (the accuracy of which is not disputed or questioned).

It will be found that a "dragnet" of vast dimensions was employed by the Government to bring before the trial jury all available evidence showing or tending to show reprehensible and blameworthy conduct on the part of the petitioner. Inference was piled on inference. But the evidence, when concluded, failed to disclose that the petitioner had become a party to any plan or purpose to violate the Mann Act (even if it had revealed other immoral and illegal conduct on his part). The evidence failed to show that he knew of any plan or purpose on the part of others to violate the Mann Act.

CONCLUSION

We feel that our argument of the other questions stated and argued in our original brief requires no amplification.

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August 31, 1943.